Supreme Court, U.S.
FILED
DEC 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

85 - 1088

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

vs.

ALAN WOODS AND CARA WOODS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. WHETHER SECTION 12-22-72 OF THE *CODE OF ALABAMA* (1975) WHICH IMPOSES A MANDATORY PENALTY OF TEN PERCENT OF THE AMOUNT OF JUDGMENT ON AN UNSUCCESSFUL DEFENDANT-APPELLANT WHILE IMPOSING NO SIMILAR PENALTY ON PLAINTIFF-APPELLANTS IS UNCONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT.

II. WHETHER THE STATUTORY AFFIRMANCE PENALTY IS A RULE OF PROCEDURE WHICH IS NOT APPLICABLE TO FEDERAL ACTIONS.

PARTIES TO THE PROCEEDING

Parties:

Alan Woods
Cara Woods
Burlington Northern Railroad Company

Affiliated or Related Parties:

The parent company to Burlington Northern Railroad Company is Burlington Northern, Inc., which owns all the stock in Burlington Northern Railroad Company. The following companies are affiliated with the Burlington Northern Railroad Company:

The Belt Railway of Chicago
The Camas-Prairie Railroad Company
Davenport, Rock Island & Northwestern Railway Company
Denver Union Terminal Railway Company
Galveston Terminal Railway Company
Houston Belt and Terminal Railway Company
Iowa Transfer Railway Company
Kansas City Terminal Railway Company
Keokuk Union Depot Company
The Lake Superior Terminal Transfer Railway Company
Longview Switching Company
Minnesota Transfer Railway Company
Paducah & Illinois Railroad Company
Portland Terminal Railroad Company
Pueblo Terminal Union Depot and Railroad Company
St. Paul Union Depot Company
Terminal Railroad Association of St. Louis
Trailer Train Company
Wichita Union Terminal Railway Company
Winona Bridge Company

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On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The order of the United States Court of Appeals, Eleventh Circuit granting appellees' motion for ten percent penalty assessment pursuant to Alabama statute is unreported but is attached hereto as Appendix A. The issue could not be raised at the trial level.

JURISDICTION

The order of the United States Court of Appeals, Eleventh Circuit granting the ten percent statutory affirmance penalty was entered on September 19, 1985 (Appendix A). Petitioner has ninety days to file its Petition for Writ of Certiorari with this Court. 28 U.S.C. § 2101(c). Therefore this Petition is time-

ly filed. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The first question presented involves the constitutionality of a statutory affirmance penalty imposed on defendant-appellants who file unsuccessful appeals in Alabama. The second question concerns the applicability of that statutory penalty to diversity actions brought in federal court.

CONSTITUTIONAL AND STATUTORY PROVISIONS

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment XIV, Section 1.

* * * * *

Interest

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. Execution therefore may be levied by the marshal, in any case where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auction of fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States courts shall distribute notice of that rate and any changes in it to all Federal judges.

28 U.S.C. § 1961(a).

* * * * *

Affirmation of stayed judgment—generally.

When a judgment or decree is entered or rendered for money, whether debt or damages, and the same has been stayed on appeal by the execution of bond, with surety, if the appellate court affirms the judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, 10 per cent damages thereon and the costs of the appellate court; and, upon the appeal of any judgment or decree entered or rendered for any amount of commissions, fees or compensation fixed or determined by the trial court and taxed or allowed as costs, if the appellate court affirms the judgment or decree of the court below and the payment thereof has been stayed on such appeal, judgment shall be entered by the appellate court against all or any of the obligors on the bond for the amount affirmed, 10 per cent damages thereon and the costs of the appellate court; provided, however, that if no supersedeas bond has been executed on such appeal, the appellate court, in the event of affirmance, shall increase the amount so allowed as costs in the court below in the judgment or decree appealed from by adding thereto 10 percent damages thereon and the costs of the appellate court.

Section 12-22-72, *Code of Alabama* (1975).

* * * * *

Interest on money judgments and costs.

Judgments for the payment of money, other than costs, if based upon a contract action, bear interest from the day of the cause of action, at the same rate of interest as stated in said contract; all other judgments shall bear interest at the rate of 12 percent per annum, the provisions of Section 8-8-1 to the contrary notwithstanding, provided, that fees

allowed as trustee, executor, administrator or attorney and taxed as a part of the cost of the proceeding shall bear interest at a like rate from the day of entry.

Section 8-8-10, *Code of Alabama* 1975.

* * * * *

Stay or Injunction Pending Appeal

(a) *Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals.* Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. . . .

(b) *Stay May be Conditioned Upon Giving of Bond; Proceedings Against Sureties.* Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court.

Federal Rules of Appellate Procedure 8.

* * * * *

Damages for Delay.

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Federal Rules of Appellate Procedure, Rule 38.

* * * * *

Damages for Frivolous Appeal.

> In civil cases, if the appellate court shall determine on motion or ex mero motu that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Alabama Rules of Appellate Procedure, Rule 38.

* * * * *

Stay or Injunction Pending Appeal.

> (a) *Stay by Supersedeas Bond.* The appellant shall not be entitled to a stay of execution of the judgment pending appeal (except as provided in Title 7, § 799, Code, and ARCP Rule 62(e)) unless he executes bond with good and sufficient sureties, approved by the clerk of the trial court, payable to appellee (or to the clerk or register if the trial court so directs), with condition, failing the appeal, to satisfy such judgment as the appellate court may render, when the judgment is:
>
> > (1) For the payment of money only, in an amount equal to 150% of the amount of the judgment if the judgment does not exceed $10,000.00; or 125% if the judgment exceeds $10,000.00; . . .

Alabama Rules of Appellate Procedure, Rule 8.

STATEMENT OF THE CASE

Alan Woods and Cara Woods brought suit on October 15, 1982 in the Tenth Judicial Circuit of Alabama, Bessemer Division, against the Burlington Northern Railroad Company (hereinafter "Burlington Northern") and others to recover damages for injuries sustained in a motorcycle accident. The case was removed to the United States District Court for the Northern District of Alabama on November 15, 1982. On

December 28, 1982, plaintiffs deleted the other defendants, and Burlington Northern was the sole remaining defendant.

The case was tried in January 1984, and the jury returned a verdict of $300,000.00 in favor of Alan Woods and $5,000.00 in favor of Cara Woods. Judgment was entered based on the jury verdict on January 13, 1984. Burlington Northern filed a motion for judgment notwithstanding the verdict or, in the alternative, for new trial on January 23, 1984. This motion was overruled on June 29, 1985.

On July 24, 1985, Burlington Northern filed a Notice of Appeal in the district court along with a Bond for Costs on Appeal and Supersedeas Bond. Under the terms of the Bond, the plaintiffs were guaranteed by the bonding company that the judgment, interest and costs of judgment and appeal would be paid. On August 16, 1985, the court of appeals affirmed the judgment of the trial court. (Appendix D).

On August 22, 1985, the plaintiffs-appellees filed a motion for assessment of statutory penalty seeking to recover a penalty of ten percent of the judgment pursuant to Alabama Code Section 12-22-72. (Appendix B). Burlington Northern responded to this motion on August 30, 1985. (Appendix C). The response contended that the Alabama affirmance penalty was unconstitutional under both the Equal Protection Clause and the Due Process Clause and that it is a procedural rule and is inapplicable in federal court.[1] The issue of the validation of the Alabama affirmance penalty was not ripe until the affirmance by the appellate court on August 16, 1985. Thus, the issue was timely raised at the appellate level.

Appellees' motion for statutory penalty was granted on September 19, 1985. (Appendix A).

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[1] Additionally, the response noted that the judgment was not final at the time of appellees' motion. The Eleventh Circuit subsequently denied appellant's Petition for Panel Rehearing thus mooting the issue of timeliness.

Petitioner now prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Eleventh Circuit.[2]

REASONS FOR GRANTING THE WRIT

Alabama law provides that a penalty of ten percent of the judgment is to be assessed against defendant-appellants who stay their judgment through a supersedeas bond and lose on appeal. The penalty is non-discretionary and applies whether the appeal is substantial or frivolous. A partial reversal obliterates the penalty. Because it is tied to the amount of judgment, the penalty is increased when the judgment is higher, even though a larger judgment would presumably increase the legal and economic need for appeal. It applies only to judgments where awards have been made in favor of the plaintiff. There is no similar penalty when judgments on behalf of the defendant are affirmed. This Alabama affirmance penalty, codified in Section 12-22-72 of the *Code of Alabama* (1975), has been justified under Alabama law as intending to discourage frivolous appeals. *See, e.g. Chapman v. Rivers Construction Company,* 284 Ala. 633, 227 So.2d 403 (1969); *Montgomery Light & Water Power Company v. Thombs,* 204 Ala. 678, 87 So. 205 (1920). And as providing the successful appellee with additional damages when the right to execute is interrupted by a supersedeas bond. *City of Birmingham v. Bowen,* 254 Ala. 41, 47, 47 So.2d 174, 180 (1956).

Petitioner submits that § 12-22-72 is unconstitutional (i) as a violation of the equal protection clause of Fourteenth Amendment and (ii) as a violation of the due process clause of the Fourteenth Amendment of the United States Constitution. Peti-

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[2] The aspects of the judgment pertaining to the merits of the underlying claim are not before the Court. In fact, Burlington Northern has satisfied the judgment with the exception of the $30,500 assessed as an affirmance penalty.

tioner further contends that the Eleventh Circuit erred in applying the Alabama affirmance penalty because of the violation of the constitutional principles enunciated in *Hanna v. Plumer,* 380 U.S. 460 (1965).

1. **The statutory affirmance penalty violates the equal protection clause.**

Any defendant which loses a money judgment must file a supersedeas bond to delay payment of the judgment until the case is fully resolved. Additionally twelve percent per annum interest must be paid on any portion of the judgment which remains extant after conclusion of the appeal process. Ala. Code § 8-8-10 (1975). If the appeal is deemed frivolous by the appellate court, an additional penalty may be assessed by the appellate court. The Alabama affirmance penalty imposes an additional non-discretional liability of ten percent of the judgment if it is ultimately affirmed regardless of the merits of the appeal.

Rules which affect access to appellate courts, such as the one involved here, must be "reasonably tailored to achieve" those ends and "uniformly and nondiscriminatorily applied." *Lindsey v. Normet,* 405 U.S. 56, 78 (1972). We submit that the Alabama affirmance penalty fails to meet that test.

The Alabama affirmance penalty serves no defined purposes.

First, the Alabama affirmance penalty fails to be reasonably tailored to serving as a deterrent to frivolous appeals. It provides no penalty against plaintiffs or losing parties in litigation involving non-monetary awards who file unsubstantial appeals. On the other hand, the statute mandates an assessment against all losing defendant appellants regardless of the substantiality or good faith of their appeal. Indeed, the affirmance penalty is a redundant appendage. The Alabama rules of appellate procedure authorizes the appellate court to assess damages for frivolous appeals.[3] Presumably, the fact that no damages are

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[3] Ala. R. of Appellate Pro. 38.

assessed under the appropriate rule (as the case here) would indicate that the ten per cent affirmance penalty is being applied in a case where the appellate court did not find the appeal to be frivolous.

Second, it adds no protection to a plaintiff's litigated property. The supersedeas bond guarantees recovery of the judgment interest and appellate costs before a judgment may be stayed pending appeal. Moreover, the twelve per cent interest per annum from the date of entry to the date it is ultimately paid guarantees reimbursement for the time cost of the delay.[4] Therefore, the statutory penalty is just as it is described—a penalty.

Therefore the Alabama affirmance penalty is both over-inclusive and under-inclusive. In light of the foregoing, we submit that the Alabama affirmance penalty is arbitrary and irrational and violates the Equal Protection Clause.

2. **The statute deprives a defendant of property without due process of law.**

The Alabama affirmance penalty also runs afoul of the Due Process Clause. Imposition of the affirmance penalty is mandatory. There is no provision for an opportunity to rebut the statutory presumptions.[5]

When property is taken by government action, the dictates of due process are determined by balancing three factors: first, the private interest that will be affected; second, the risk of er-

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[4] Ala. Code § 8-8-10 (1975).

[5] The Supreme Court many years ago held that the imposition of a penalty for filing a supersedeas bond does not violate due process principles. *Louisville & N. R. Co. v. Stewart*, 241 U.S. 261 (1916). We contend that modern principles of due process discussed *infra* call into question the continued validity of *Stewart*.

roneous deprivation of that interest under the procedural design of the statute; and third, the interest of the government including the legislative objective and the burden that an alternative procedure would entail. *Mathews v. Eldridge,* 424 U.S. 319, 355 (1976); Comment, *Mandatory 10-Percent Penalty on Unsuccessful Appeals of Money Judgments in Alabama—Constitutional and Policy Considerations,* 32 *Ala. L. Rev.* 197, 217 (1980).

The statute affects a substantial private interest. Petitioner in this case stands to incur an additional obligation of $30,500 as a result of the affirmance penalty. Furthermore, every defendant filing an appeal in Alabama must first weigh the possibility of a ten percent add-on imposed under the legislation. Clearly, the statute affects a private property interest.

Moreover, the error in the statutory design is inherent. The statute necessarily entertains erroneous but irrebuttable presumptions. First, the statute presumes that all appellants who lose on appeal bring unmeritorious appeals. Second, the statute presumes that an appeal from a larger verdict is more frivolous than a small one. Common experience suggests that indeed the reverse is true. For example, it would be hard to suggest that Texaco would be acting frivolously to appeal the *Pennzoil* verdict. Under Alabama law Texaco would be required to place over one billion dollars at risk for the privilege of review. Additionally, the act presumes that a plaintiff's litigated property is somehow at risk after a defendant executes a supersedeas bond with surety. These presumptions are completely irrational and arbitrary and cannot be reasonably defended under any circumstances.

This Court has looked with disfavor on irrebuttable presumptions arising out of state statutes. See e.g. *Cleveland Board of Education v. La Fleur,* 414 U.S. 632 (1974). In that case, the Court held that any such irrebuttable presumption is forbidden "when that presumption is not necessarily or universally true in

fact, and when the state has reasonable alternative means of making the crucial determination." *Id.*, at 645.

When penalties are enforced by a state, due process requires that there be some relationship between the penalty and the action sought to be deterred by the penalty. Simply put, there must be some evidence that an appeal is in fact frivolous before a penalty for filing a frivolous appeal can be assessed. Compare *Thompson v. Louisville,* 362 U.S. 199 (1960). Thus, the Alabama affirmance penalty is wrongfully applied because (1) it provides no reasonable means for determining whether an appeal is frivolous and (2) there is not even an allegation much less any evidence that the appeal brought by Petitioner in this case was frivolous.

3. The affirmance penalty should not be applied by federal courts.

The Federal Rules of Appellate Procedure completely control the handling of appeals in the United States Court of Appeals. Thus, the rules permit the court to stay execution of judgments and to require a supersedeas bond during such stay. Fed. R. App. P. 8. Interest accrues on judgments from the date of entry. 28 U.S.C. § 1961; Fed. R. App. P. 37. The Court of Appeals is permitted to assess damages when an appeal is frivolous. Fed. R. App. P. 38. This Court has ordered that these Appellate rules "shall govern *all proceedings* in appeals . . . thereafter brought . . ." Order of the United States Supreme Court, December 4, 1967. (emphasis added). Consequently, it is federal law which governs the procedure for appeals brought in federal court.

Appellate procedure in state court is analogous, though different in some particulars. See Ala. R. App. P. 8, 37, 38; *Code of Ala.* § 12-22-72 (1975). In the federal court the amount needed to secure a supersedeas bond is discretionary with the court, but in the state court it is mandatory. The amount of bond in the federal appeal is set by the court. The amount is fixed at

125% of the judgment in state courts. Interest on federal judgments is tied to treasury bills, while the rate in state courts is set at 12%. And of course, the Federal defendant is not subject to an affirmance penalty, but the state court defendant is.

Throughout the course of this appeal, the federal courts utilized federal rules to determine the applicable procedure. Thus, the federal time-table was followed by the parties. When seeking a stay of the judgment, petitioner followed the requirements of Rule 8 of the Federal Rules of Appellate Procedure. The imposition of the Alabama affirmance penalty was thus an aberration imposed by the Eleventh Circuit.

Petitioner maintains that the Federal Appellate rules, which are declared by order of this court to be controlling, should be applied, and that the state court rules have no field of operation. *Hanna v. Plumer,* 380 U.S. 460 (1965) held that when there is a controlling federal "rule it shall be enforced, provided the rule really regulates procedure." *Hanna v. Plumer, supra* at 464, quoting *Sibbach v. Wilson & Co.,* 312 U.S. 1, 14 (1940).

Even assuming that the Alabama affirmance penalty is not within the scope of the Federal Appellate rules, the state rule should not be applied. The *Hanna* opinion made clear that the interest protected in *Erie Railroad Co. v. Thompkins,* 304 U.S. 64 (1938) dealt with "a realization that it would be unfair for the character or result of litigation materially to differ because the suit had been brought in a federal court." *Id.* at 467. More specifically *Erie* struck down a "general law" which had arisen out of the progeny of *Swift v. Tyson,* 16 Pet. 1 (U.S. 1842). There is of course no "general law" in this case, because the Appellate rules and federal statutes control. There is no change in the character or result of the litigation, which was already determined on the merits in this case before the penalty was imposed. It is ironic that the Alabama affirmance penalty appears in the Title of the Alabama Code entitled "Appellate Proceedings". The Alabama Legislature at least regarded the penalty as a procedural matter, yet the Eleventh Circuit Court of Appeals failed to follow that legislative intent.

4. **The issue is already before the Court.**

The question of whether the affirmance penalty is unconstitutional is before the Supreme Court in the case of *Aetna Life Insurance Co. v. Lavoie,* 53 U.S.L.W. 3847 (No. 84-1601, June 4, 1985), an appeal from the Alabama Supreme Court. *Lavoie* does not raise the issue of whether the affirmance penalty should be applied in federal court. Additionally, *Lavoie* contains possible grounds for reversal which may moot the affirmance penalty issue. Therefore, this petition is the more appropriate vehicle for disposing of the affirmance penalty question.

CONCLUSION

The Alabama affirmance penalty was enacted during the middle of the 19th century at a time when all states were attempting to severely restrict access to appellate courts. Since that time, beliefs concerning the appropriate role of courts in society have drastically changed. With the advent of the Fourteenth Amendment and the accompanying realization in modern time of its scope, the validity of the affirmance penalty is completely undermined. Therefore, we respectfully request that this petition be granted for the purpose of invalidating the Alabama affirmance penalty.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7510

Alan Woods and
Cara Woods,
Plaintiffs-Appellees,

vs.

Burlington Northern
Railroad Company, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the
Northern District of Alabama

Before VANCE and JOHNSON, Circuit Judges, and MORAN, Senior Circuit Judge.

BY THE COURT:

Appellees' motion for 10% penalty assessment pursuant to Alabama Statute is GRANTED.

Filed September 19, 1985.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 84-7510

Alan Woods and Cara Woods,
Plaintiffs-Appellees,

vs.

Burlington Northern
Railroad Company, et al.,
Defendants-Appellants.

MOTION FOR ASSESSMENT OF STATUTORY PENALTY

COME the Plaintiffs-Appellees in the above-styled cause, by and through their attorneys of record, and state unto this Honorable Court as follows:

1. Your movant was the verdict-winner below having obtained a verdict on which final judgment was entered in the amount of $305,000. Said judgment was stayed on appeal by the execution of bond with surety on behalf of Burlington Northern Railroad Company, a corporation, the Defendants-Appellants. (See Exhibit 1 attached.)

2. This Court affirmed the judgment of the court below and the twenty-day period for the filing of a petition for rehearing and/or suggestion of en banc consideration has lapsed on, to-wit: September 5, 1985. No petition for rehearing or suggestion for an en banc consideration has been filed on behalf of Defendants-Appellants.

3. The provisions of Tit. 12, *Code of Alabama,* § 12-22-72 (1975), are applicable. (See Exhibit 2 attached hereto). See *Proctor v. Gissendaner,* 587 F.2d 182 (5th Cir., Ala. 1979). (See Exhibit 3 attached hereto). Also, see *Standridge Tractor & Imple-*

ment Company v. Auto-Owners Insurance Company, a corporation, Eleventh Circuit Court of Appeals, Case No. 81-7100. (See Exhibit 4 attached hereto.)

4. We are informed and believe that both under the wording of the Alabama statute and in accordance with the practice that prevails in the Alabama courts, the statutorily mandated penalty is to be assessed by or in the Appellate Court - separate and apart from any interest and/or costs to which the Appellee is or may be entitled in either the Appellate or District Court.

WHEREFORE, PREMISES CONSIDERED, your Movant respectfully requests this Honorable Court to enter an order directing the Clerk of the Eleventh Circuit Court of Appeals to assess the statutorily mandated penalty of ten percent (10%) of the amount of the affirmed judgment.

Respectfully submitted,

HARE, WYNN, NEWELL & NEWTON

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APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 84-7510

Alan Woods and Cara Woods,
Plaintiffs-Appellees

vs.

Burlington Northern
Railroad Company, et al.,
Defendants-Appellants

RESPONSE TO APPELLEE'S MOTION FOR ASSESSMENT OF STATUTORY PENALTY

Comes now Burlington Northern Railroad Company, Defendant-Appellant in the above-referenced case, and says as follows in response to Plaintiffs-Appellees' Motion for Assessment of Statutory Penalty:

1. The statutory penalty cannot be assessed at this time because the judgment of the Court of Appeals is not final. Contrary to the assertions of the appellees, the time for the filing of a petition for rehearing has not lapsed. The appellant will file a petition for rehearing on or before September 5, 1985, the final date for filing.

2. *Alabama Code* § 12-22-72 (1975), which enacts the statutory affirmance penalty, is violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

3. The Alabama statutory affirmance penalty is violative of the due process clause of the Fourteenth Amendment to the United States Constitution.

4. The Alabama statutory affirmance fee is a procedural rule and is inapplicable in federal court under the doctrine of *Erie Railroad Company v. Tompkins*, 304 U.S. 64 (1938) and its progeny.

WE RESPECTFULLY REQUEST ORAL ARGUMENT

/s/ Kenneth D. Davis
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APPENDIX D

United States Court of Appeals,
Eleventh Circuit.

No. 84-7510.

Alan Woods and Cara Woods,
Plaintiffs-Appellees,

v.

Burlington Northern
Railroad Company, et al.,
Defendants-Appellants.

Aug. 16, 1985.

Appeal from the United States District Court for the Northern District of Alabama.

Before VANCE and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

Plaintiffs were injured when the motorcycle on which they were riding overturned. The accident occurred in Pensacola, Florida on Main Street near its intersection with Comandencia. Defendant Burlington's track runs up the center of Main Street at that location. Plaintiffs alleged that the accident was caused by a dangerous defect in the surface of Main Street and that the defect was created and controlled by Burlington. Trial by jury resulted in substantial verdicts and judgments in plaintiffs' favor. Burlington appeals and makes four contentions of error.

(1)

Burlington first argues that the trial court did not enforce its pretrial order in an even handed manner. In pertinent part, the order provides:

10. *Exhibits.* The parties shall by October 14, 1983, exchange lists describing all writings, recordings, documents, bills, reports, records, photographs and other exhibits (collectively called "exhibits") which they may utilize at trial. Unless specifically agreed between the parties or allowed by the court for good cause shown, the parties shall be precluded from offering as substantive evidence any exhibit not so identified. Except where beyond a party's control or otherwise impracticable (e.g., records from an independent third-party being obtained through subpoena), each party shall make such exhibits available for inspection and copying. Except to the extent written notice to the contrary is filed with the Clerk of the Court within five days after receiving such list, each party shall be deemed to have agreed (for purposes of this litigation only):

. . . .

(g) that each of the listed documents is admissible at trial.

No lists were exhanged. Instead, the parties exchanged the actual exhibits that they proposed to use. No written notices or objections to opposing parties' exhibits were filed with the clerk of the court by either side.

Before the jury was struck the following colloquy took place:

THE COURT: Are there any other preliminary matters? I take it you've exchanged a list of witnesses. Have you exchanged a list of documents?

MR. STABLER [Burlington's attorney]: I guess we have, haven't we?

THE COURT: Well, since I have heard nothing by way of objection to documents, any document that's offered will be received in evidence.

MR. CARLTON WYNN [Plaintiffs' attorney]: We've given you a master sheet on all of the exhibits that we would be talking about and still that—and plus, I think I've shown you every picture that I had and I think—

MR. STABLER: We have exchanged information very freely, I believe.

THE COURT: All right.

Notwithstanding the apparent agreement of the parties and the absence of any pre-trial objections by any party the following developed during plaintiffs' examination of their first witness:

MR. WYNN: I offer that as plaintiffs' exhibit number five.

MR. STABLER: Your Honor, I'm going to object to this.

THE COURT: Let me ask you this, Mr. Stabler, was this one of the exhibits listed?

MR. STABLER: We've seen it and objected to it before.

THE COURT: Have you objected to it?

MR. STABLER: Objected to it in the deposition, Your Honor.

THE COURT: Well, the pretrial order required you before the receipt of the list of the exhibits to file an objection with the Court, and it further provided that if no objections were filed with the Court, the exhibit when offered at trial would be received in evidence.

MR. STABLER: Your Honor, I don't want to make a point of it. I didn't receive a list of the exhibits in that form, but I was made aware they were going to offer them and I have been made aware—

MR. WYNN: He has said, and I represent to the Court he has seen every picture I have in my file.

MR. STABLER: I'm not making a point of that, but I was not given a formal list for the proceedings we're talking about here. I'm not making a point of it, Carlton, but I'm explaining why I didn't give a formal response.

MR. WYNN: They gave the pictures themselves, I don't see how they could be any more accurate than that, if they are talking about numbers a picture might have—

THE COURT: Well, does either side or did either side comply with the pretrial order in providing a list of documents?

MR. WYNN: We did, and he showed me his and I showed him mine.

MR. STABLER: I don't believe you gave me a list.

MR. WYNN: When I showed you the pictures.

MR. STABLER: I agree with you. That's what I am telling the Court. I agree with you.

MR. WYNN: I don't know how else I could give you a better list than the pictures themselves. I didn't say it with regard to these pictures—they are numbered one through fifty—number one—this is number twenty-five, gave everything in my file, gave it to you and said this is what we expect you to use in this case.

THE COURT: All right. The objection is overruled.

Q. All right sir.

MR. STABLER: Your Honor, you realize he is talking about pictures of another area than in this case, an area he says is comparable to the area in this case?

> THE COURT: All I realize is I signed a pretrial order that required that objections to exhibits be filed with the Court prior to trial, so I could pass on them prior to trial and no objections have been filed with the Court and, as I said to ya'll on the record this morning the exhibits which have been identified when offered will be received in evidence because there has been no objection.

The thrust of Burlington's contention is that by enforcing a portion of its pretrial order (the requirement that written objections be filed in advance of trial) and waiving another (the exchanging of lists of exhibits), the district court unfairly allowed into evidence inadmissible exhibits[1] that were highly prejudicial.

As we will briefly note in part 2 *infra,* we conclude that the exhibits were admissible. Even if we concluded to the contrary, however, we would not accept that the trial court's handling of the matter was unfair or erroneous.

This court has recognized that trial courts have wide latitude in controlling pre-trial procedures. Enforcement of pretrial orders in matters such as the one now before the court is within the discretion of the district court. *See Typographical Service, Inc. v. Itek Corp.,* 721 F.2d 1317, 1319 (11th Cir.1983); *Fabrica Italiana Lavorazione Materie Organiche, S.A.S. v. Kaiser Aluminum & Chemical Corp.,* 684 F.2d 776, 780-81 (11th Cir.1982); *National Distillers & Chemical Co. v. Brad's Machine Products,* 666 F.2d 492, 497 (11th Cir.1982). The trial judge's rulings in this area "must not be disturbed unless it is demonstrated that he has clearly abused the broad discretion vested in him by Rule 16." *National Distillers,* 666 F.2d at 497 (quoting *Davis v. Duplantis,* 448 F.2d 918, 921 (5th Cir. 1971)).

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[1] The exhibits about which Burlington complains are not specifically identified in its brief. We assume, as did the writer of appellees' brief, that they were five photographs of Main Street and a letter dated April 8, 1981, from the Pensacola Streets/Traffic Superintendent to Burlington.

In this case the trial court treated the parties' exchange of the actual exhibits as substantial compliance with the pre-trial order's requirement that lists of the exhibits be exchanged. It allowed into evidence the exchanged exhibits and did not allow the plaintiffs to introduce exhibits that had not been exchanged.

Compliance with prescribed pretrial procedures is of increasing importance to the effective administration of justice in the face of burgeoning case loads. Trial judges and opposing litigants have a right to expect that the court's orders will be carefully followed in order that the business of the court may be handled expeditiously and fairly. Appellate courts are empowered, of course, to provide relief from arbitrary and unreasonable application of rules. Such, however, is not the case before us. This was a reasonable requirement with an obvious and important purpose, which in our view was applied in a reasonable manner. Counsel cannot show cavalier disregard for a district court's pre-trial requirements and reasonably expect this court to extricate them from an unhappy aftermath.

(2)

Burlington next argues that the district court erred in admitting the exhibits[2] into evidence and in allowing a defense witness to be impeached with questions concerning other accidents that allegedly occurred in the same vicinity. In connection with the exhibits, there is an overlap between this contention and the first. Our ruling with respect to the first contention disposes of the second. It is appropriate to note, however, that in our view the exhibits were both relevant and admissible. Plaintiffs' theory, which had ample evidentiary support, was that Burlington had allowed the condition of the surface of Main Street to deteriorate all along the three blocks that its tracks ran onto and up the center of the street. Burlington disputed this

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[2] For purposes of our decision we assume that Burlington properly preserved the claimed errors.

generalized state of deterioration. The photographs simply show the condition of the street in that area. The letter, which was supplemented by the testimony of the street superintendent, showed that he complained to the railroad about the street condition over a year before the accident.

The admissibility of evidence is another aspect of a trial that is committed to the discretion of the trial court. The trial court should be reversed only when appellant can show that it abused its broad discretion and that the ruling adversely affected appellant's substantial rights. *Murphy v. City of Flagler Beach,* 761 F.2d 622, 626 (11th Cir.1985); *Pesaplastic, C.A. v. Cincinnati Milacron Co.,* 750 F.2d 1516, 1524 (11th Cir.1985); *Loughan v. Firestone Tire & Rubber Co.,* 749 F.2d 1519, 1521, 1524 (11th Cir.1985). Even aside from Burlington's noncompliance with the pretrial order, we would reject a contention that the district court abused its discretion in admitting this evidence because the exhibits fairly supported plaintiffs' case and were relevant to the issues in controversy.

Burlington next complains that the trial court abused its discretion by allowing plaintiffs' counsel to cross-examine a defense witness with questions concerning other accidents. Burlington does not identify the particular ruling on which its complaint is based. From our reading of the transcript, however, we find that defendant's roadmaster, Padley, testified that he inspected the track in Pensacola about once a month. He testified on direct examination about the condition of the track and street in the area where the accident occurred and indicated that it was safe for traffic. He was questioned about the photographic exhibits without any limitations as to a precise area. On cross examination, he denied that the track was in a hazardous condition in August 1982. He was then asked whether he was familiar with other specific accidents that had occurred shortly before or shortly after plaintiffs' accident. The questions concerned accidents that were said to have occurred at locations in Main Street along the Burlington track but not at

the precise location where plaintiffs were injured. The witness denied any knowledge of the accidents, and no other evidence concerning them was introduced.

A fair interpretation of the witnesses' direct testimony was that the Burlington track in this area was maintained in a condition that was not hazardous. It was not an abuse of discretion to allow, as impeachment, questions concerning other accidents that were said to have occurred at about the same time and within the same area.

(3)

Burlington complains about several statements made by opposing counsel in closing argument. We have reviewed each of the claims in context and have determined that reversible error has not been demonstrated.

One statement by plaintiffs' counsel, however, deserves specific attention: "[I]t's improper for us to say, put yourself in the shoes of the plaintiff. . . ." This is substantially the same variation of the "golden rule" argument that was condemned by the fifth circuit in *Loose v. Offshore Navigation, Inc.*, 670 F.2d 493, 496-97 (5th Cir.1982). The straight golden rule argument—"put yourself in the shoes of my client,"—clearly has been banned by binding precedent. *See Burrage v. Harrell,* 537 F.2d 837, 839 (5th Cir.1976); *Har-Pen Truck Lines, Inc. v. Mills,* 378 F.2d 705, 714-15 (5th Cir.1967). This reversed version is calculated to evoke precisely the same improper emotional response. If made by the prevailing party this improper argument ordinarily will result in reversal. It does not in this case only because Burlington did not object to it.

Our general rule is that a timely objection is necessary to bring to the trial court's attention alleged errors in the conduct of a trial. *Jenkins v. General Motors Corp.*, 446 F.2d 377, 382-83 (5th Cir.1971), *cert. denied,* 405 U.S. 922, 92 S.Ct. 959, 30 L.Ed.2d 793 (1972). The rule is applied to argument of counsel,

even argument found to be inflammatory, prejudicial and improper. *Brown & Root, Inc. v. Big Rock Corp.*, 383 F.2d 662, 666-67 (5th Cir.1967). The rule is grounded on sound policy. First, the requirement fosters judicial economy. By bringing an error to the trial judge's attention, the court has a chance to correct it on the spot. Requiring timely objection prohibits counsel from "sandbagging" the court by remaining silent and then, if the result is unsatisfactory, claiming error. *See Sanders v. Chatham County Board of Commissioners*, 728 F.2d 1367, 1368 (11th Cir.1984). Second, there are a number of good reasons why skilled trial counsel may make a tactical decision not to object to improper argument: (1) an argument that looks highly improper in a cold record may strike counsel as being wholly lacking in effect; (2) because of the "chemistry" of the courtroom counsel may think that the improper argument may offend and in effect backfire; and (3) the improper argument may open the door to a response that will be of more value than a sustained objection.

We retain the authority to review for plain error but exercise of that authority is seldom justified in reviewing argument of counsel in a civil case. We conclude it is not justified here.

(4)

Burlington finally contends that the verdict is so excessive as to "shock the judicial conscience," the standard reaffirmed by this court in *Jackson v. Magnolia Brokerage Co.*, 742 F.2d 1305, 1306-07 (11th Cir.1984). The jury could have found from the evidence that plaintiff Alan Woods sustained painful and serious injuries, that required two surgical operations, that resulted in permanent pain and disability and that will result in a permanent reduction in earnings. Our system guarantees that, when demanded, evaluation of the damages of a prevailing party will be by a jury. Under all of the circumstances in this case the generosity of the jury's verdict may be surprising. A surprisingly large verdict, however, is not sufficient justification for an

appellate court's substitution of its evaluation of plaintiffs' damages for that of a jury. The verdict was not so out of proportion to the injuries sustained by the plaintiff as to shock the judicial conscience.

AFFIRMED.

Supreme Court, U.S.
FILED
FEB 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1088

IN THE

Supreme Court Of The United States

October Term, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

vs.

ALAN WOODS AND CARA WOODS,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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TABLE OF ABBREVIATIONS

"Petitioners" and/or "The Railroad"	Either of these terms is intended to refer to the petitioners in the present proceedings which were the appellants in the Eleventh Circuit Court of Appeals and the defendants in the District Court.
"Respondents" and/or "Woods"	Alan Woods and his wife, Cara Woods, were the plaintiffs in the original action. They were the appellees in the Eleventh Circuit appeal and are the respondents in the present petition.
"Rule 8" and "Rule 38"	Either of these phrases is intended to refer to the applicable Federal Rule of Appellate Procedure.
"Subject Statute"	This phrase is intended to refer to Code of Alabama § 12-22-75 (1975).
"P BR"	Petitioner's Brief.

No. 85-1088

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ARGUMENT

1. The Alabama Affirmance Fee Statute Does Not Violate The Fourteenth Amendment.

Note: This issue is already before the Court. The constitutionality of the subject statute is before this Court in another appeal from the Alabama Supreme Court. See *Aetna Life Insurance Co. v. Lavoie,* 53 U.S.L.W. 3847 (No. 84-1601, 4 June, 1985).

The Alabama Supreme Court has previously upheld the constitutionality of the affirmance fee statute. *Central of Ga. Ry Co. v. Steed,* 287 Ala. 64, 76, 248 So.2d 110 (1971).

The railroad's argument that the subject statute is violative of the equal protection clause of the Fourteenth Amendment is based on the assumption that the paramount and controlling purpose of the statute is to discourage frivolous appeals. P BR pp. 7-8 Citing *Montgomery Light & Water Power Company v. Thombs,* 204 Ala. 678, 87 So. 205 (1920). [Hereinafter *Thombs*]. As to the *Thombs* case, the Alabama Supreme Court subsequently noted:

> "While this court *incidentally observed* in Montgomery Light & Water Power Co. v. Thombs (citing) that§ 6153, Code (the predecessor to § 12-22-73) was intended to penalize frivolous or delay appeals, *it was not intended to assert that such was the only purpose, . . .*"
>
> *Snellings v. Builders Supply Co.,* 229 Ala. 1, 156 So. 858 (1934). (Emphasis supplied).

In point of fact, the Alabama Supreme Court in an even later case held that "in our view, *the real purpose* of § 814 (a later predecessor of § 12-22-73) was to *provide appellate litigants with the additional damages* from superseded judgments when an affirmance has been ordered. *City of Birmingham v. Bowen,* 254 Ala. 41, 47, 47 So.2d 174 (1950). (Emphasis supplied).

The Eleventh Circuit has recognized this as the paramount purpose of the Alabama statute.

> "The Alabama Supreme Court applied the 10 percent penalty, noting that the statute's purpose was to provide appellee litigants with additional damages from superseded judgments when an affirmance fee has been ordered."
>
> *Locke v. Allstate Insurance Co.,* 696 F.2d 1340, 1342 (11th Cir. 1983).

The subject statute does not impose any classification based on invidious factors such as race, nor does it affect any fundamental right.

This Court has consistently recognized that as long as a state provides a full and fair trial on the merits, there is no require-

ment under the due process clause of the fourteenth amendment that appellate review be provided as well. See *Lindsey v. Normet*, 405 U.S. 56, 77 (1972). [Hereinafter *Lindsdey*]. The Alabama Constitution contains no specific provision for appellate review. See *Ex parte Tsimpides*, 272 Ala. 430, 434-37, 131 So.2d 873 (1961), cert. denied 369 U.S. 804 (1962); *Johnson v. Barnes*, 250 Ala. 292, 34 So.2d 144 (1948). The right of appeal in Alabama is entirely statutory and is therefore subject to the conditions (such as the subject statute) enacted by the Alabama legislature.

Although states do not have a unfettered right to place restrictions on rights of appeal they do grant, state procedures must be upheld if they are rationally related to a legitimate state interest. *City of Cleburne v. Cleburne Living Center*, 105 S.Ct. 3249, 3254 (1985) [hereinafter *Cleburne*]; *Lindsey*, 405 U.S. at 78. In making this analysis, such state actions are given wide latitude and are presumed to be valid. *Cleburne*, 105 S.Ct. at 3254.

The above stated purposes of the subject statute represent legitimate state interests since Alabama clearly may act to discourage insubstantial appeals which burden the legal system and to encourage prompt payment of judgments. See *Lindsey*, 405 U.S. at 78.

The railroad cites *Lindsey* in support of its position as if to argue that the Alabama statute is analagous to the double bond requirement which the Court struck down in *Lindsey*. In that case, however, no legitimate state interest was advanced for a bonding requirement which distinguished landlords from tenants. Indeed, there the bonding requirement was placed on those least able to meet it – tenants – and seemed design to simply foreclose access to an appeal. The Alabama statute instead is directed specifically at parties with an incentive to cause delay.

This Court upheld an identical statute in *Louisville & Nashville Railroad Co. v. Stewart*, 421 U.S. 261, 263 (1916), on these grounds. Justice Holmes wrote:

> "The first of the other objections is that the court of appeals was not authorized to add 10 per cent damages on the amount of the judgment, as it did. But the railroad company obtained a supersedeas, and the law of the state makes 10 percent the cost of it to all persons if the judgment is affirmed. There was no obligation upon the state to provide for a suspension of the judgment, and nothing to prevent its making it costly in cases where ultimately the judgment is upheld."

The subject statute is applicable to money damages affirmed on appeal. It is the first in a sequence of three statutes, each of which provides for a ten percent affirmance fee.[1] Each of these statutes are an integral part of an overall state scheme by which the state of Alabama administers its judicial system. For a period of over a hundred and sixty years[2] by a number of statutes enacted by the Alabama legislature and by a number of rules adopted by the Alabama Supreme Court, the State of Alabama has established a cohesive pattern of law governing every aspect of the Alabama's judicial system from filing costs to affirmance fees. The ruling which petitioner seeks would compel an intrusion by the federal courts into the state of Alabama's overall scheme for the administration of its judicial system and would result in a disruption of the integrated network of statutes and rules which make up the Alabama judicial system.

The Alabama judicial system is a function of many interconnecting statutes and rules most (if not all) of which have counterparts in the Federal Rules of Civil Procedure and/or the Federal Rules of Appellate Procedure. The railroad's position would require this Court to ignore the legal, equitable,

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[1]See also Alabama Code § 12-22-73 (1975) (right of property); Alabama Code § 12-22-74 (1975) (recovery of chattels).

[2]The subject statute was first enacted by the Alabama Legislature in 1820. Clay's Digest, 309, § 20. See *Ex parte Weissinger & Crook*, 7 Ala. 710, 712 (1845); *Lawrence v. Jones*, 37 Ala. 388, 389 (1861). It has since been readopted in essentially the same form in ten subsequent recompilations or recodifications of the Alabama Code. The legislative history of the subject statute appear in parenthesis at the end of the statute in the Alabama Code.

and practical considerations which influenced the Alabama legislature and the Alabama Supreme Court to enact and/or to adopt the various statutes and rules which together make up Alabama's judicial system. This would accomplish the realization of the fear that Justice Harlan expressed in his concurring opinion in *Hanna v. Plummer,* 380 U.S. 460 (1965):

> ". . . it is hard to think of a case where a conflicting state rule would be allowed to operate even though the state rule reflected policy considerations which, under *Erie* would lie within the realm of state legislative policy."
>
> *Hanna* at 480.

The railroad argues in effect that the Alabama statute would be better taken if it were more limited. However, the Alabama legislature concluded that the statute should apply automatically, perhaps believing that the deterrent effect on non-meritorious appeals would be greater and the burden on the courts of enforcing the penalty would be less. Whether that is so is the business of the legislature. As the Court held in *Williamson v. Lee Optical,* 348 U.S. 483, 487-88 (1955):

> "The law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."

2. The Alabama Affirmance Fee Statute Should Be Applicable In The Eleventh Circuit Court of Appeals In Diversity Actions Governed By Alabama Law.

The railroad contends that the Alabama statute conflicts with *Fed. R. App. P.* Rule 38 and *Fed. R. App. P.* Rule 8. The railroad's argument on this point is based on its interpretation of this Court's holding in *Hanna v. Plummer,* 380 U.S. 460 (1965). [Hereinafter *Hanna*].

NOTE: We first note that the identical argument was advanced by the appellant/petitioner and rejected by the Eleventh Circuit in *Jackson v. Magnolia Brokerage Company,* 742 F.2d

1305 (11th Cir. Ala. 1984) cert. denied ___ U.S. ___, 105 S.Ct. 2704, 86 L.Ed.2d 720 (1985). See Appendix I.

What follows is Woods' response on the merits of this argument.

In *Hanna* and subsequently in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980) [hereinafter *Walker*] this Court clarified the analysis which a federal court should employ when, in an action based upon the court's exercise of diversity jurisdiction, a state law is alleged to conflict with a federal rule of procedure. If the federal rule "directly conflicts" with the state law, the court must then determine whether the federal rule is within the scope of the Enabling Act, 28 *U.S.C.* § 2072 (1977), and is supported by a constitutional grant of federal power. *Hanna* at 471-474; *Walker* at 749.

The railroad asserts that a *Hanna* analysis would reveal that in view of Rules 8 and/or 38, *Fed. R. App. P.*, it would be improper for a federal court in a diversity case to give application to Alabama's affirmance fee statute.

Woods believes that petitioner's view of *Hanna* is defective. The railroad contends, in effect, that whenever it appears that the issue in question is merely addressed by the federal rule, a *Hanna* analysis is essential. According to petitioner, *Hanna* requires almost mechanical disregard for state law on all matters which are covered by a federal rule.

Respondents submit that a *Hanna* analysis that compels a federal court to disregard state law is dependent upon a preliminary finding of the existence of a "direct collision" or an "unavoidable collision" between the federal rule and the state law. *Hanna* at 470, 472; *Walker* at 749. In determining the existence of a direct collision, the court should give consideration to the effect that application of the state law would have on the federal rule. In *Hanna* this Court dealt with a state law which if given effect would have totally defeated the purpose and the operation of the applicable federal rule. This Court alternately noted:

> "The Erie rule has never been invoked to *void* a Federal Rule. It is true that there have been cases where this

Court had held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that Erie commanded *displacement* of a Federal Rule by an inconsistent state rule, but rather that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, Erie commanded the enforcement of state law."

Hanna at 470. (Emphasis supplied).

"To hold that a Federal Rule of Civil Procedure must *cease to function* whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress's attempt to exercise that power in the Enabling Act."

Hanna, Id. at 473-474. (Emphasis supplied). See also *Walker* at 747-48.

Respondents submit that there is no direct or unavoidable collision between the subject statute and federal Rules 8 and/or 38 which voids or displaces these federal rules or causes them to cease to function.[3]

The Alabama statute is directed to a specific class of cases not expressly governed by Rule 38 and does not even purport to address the matters governed by Rule 8.

The Alabama statute applies only if three conditions are present: (1) a money judgment is entered; (2) the judgment is stayed on appeal; and (3) the appellate court affirms the judgment. *Snellings v. Builder's Supply,* 229 Ala. 1, 155 So.

[3]It should be noted that the contrary is not true. Petitioner's position, if adopted, would completely vitiate the Alabama statute. In consequence, defendants (citizens and non-citizens alike) in diversity actions in federal courts in Alabama would be accorded significantly different and better treatment than defendants in the state courts of Alabama. This effect is offensive to the *Erie* rationale (see *Hanna,* headnote 11 at 467) and would provide defendants with an illegitimate motive to remove cases to the federal court.

858 (1934). Rule 38, in contrast, permits the appellate court to award damages and costs to any appellee if it determines that his appeal is frivolous.

It is significant to note that the Supreme Court of Alabama has adopted a state counterpart to federal Rule 38. *Ala. R. App. P.* Rule 38.[4] The two rules are virtually identical. The railroad's contention that there is a direct conflict between the subject statute and federal Rule 38 which has the effect of voiding or displacing the federal Rule or ceasing its function is utterly inconsistent with the fact that the Alabama Supreme Court has applied *both* the affirmance fee statute and the state frivolous appeal rule. See *McAnnally v. Levco, Inc.*, 456 So.2d 66, 67 (Ala. 1984). See also *Hutson v. Hutson*, 351 So.2d 588, 591 (Ala. Civ. App. 1977).

The Alabama affirmance fee statute is not designed to supplant the authority of an appellate court (state or federal) to impose monetary sanctions on appellant's who prosecute frivolous appeals. Thus, both state and federal Rule 38 — and — the Alabama statute are parallel, not conflicting. Both the state and the federal rule apply only to frivolous appeals whereas the statute applies only to money judgments stayed on appeal and later affirmed. Put another way, each Rule covers ground which the statute does not.

Thus, neither in purpose nor in operation does the Alabama statute directly collide with federal Rule 38.

Nor does the Alabama statute conflict with Rule 8, *Fed. R. App. P.* That Rule merely provides that a federal court of appeals may stay a judgment pending appeal and may condition such relief upon the filing of a bond or other security. Rule 8 does not purport either to provide for or to prohibit the assessment of costs or damages against an unsuccessful appellant.

As Justice Harlan observed in his concurring opinion in *Hanna*, the *Erie* decision reflected more than just the Court's concerns about forum-shopping and equitable administration

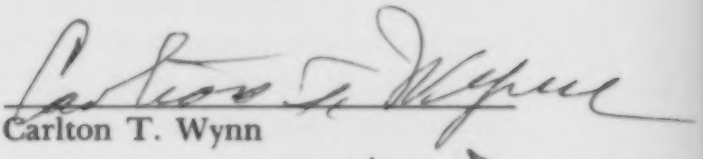
[4]In so doing, the Alabama Supreme Court did not repeal § 12-22-72 *Ala. Code* (1975). See Appendix II, part A, to the *Ala. R. App. P.* which lists the statutes which are superseded or modified by the rules.

of the laws. 380 U.S. at 474. That decision remains "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of power between the state and federal systems." *Id.* Alabama has not seen fit to permit the recovery of prejudgment interest on money judgments in tort cases. Prejudgment interest is recoverable in 25 states and in federal courts in actions arising under federal law. See Appendix II. The Alabama affirmance fee statute has an ex ante prejudgment interest effect which compensates the injured plaintiff for the additional expenses and attorney fees associated with an appeal and for the loss of the use of the money judgment retained by the defendant during the pendency of his appeal. As the Fifth Circuit correctly concluded in *Proctor v. Gissendaner,* 587 F.2d 182, 184 (5th Cir. 1979), for purposes of *Erie* the Alabama statute is *substantive* — not merely procedural as the railroad contends. As *Hanna* and *Walker* indicate, the *Erie* analysis is supplanted only if the state statute directly conflicts with a federal rule of procedure. If not, the state's policies, as embodied in its own statutes, must be honored by the federal court. Such is the case here.

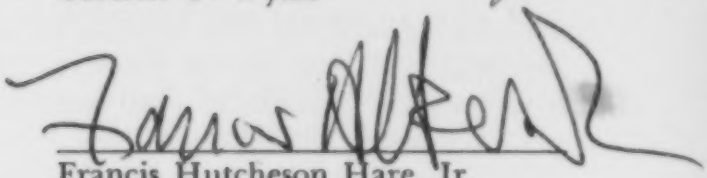
CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari in this case should be denied.

Respectfully submitted,



Carlton T. Wynn



Francis Hutcheson Hare, Jr.

HARE, WYNN, NEWELL & NEWTON
700 City Federal Building
Birmingham, AL 35203
(205) 328-5330

Counsel for Respondents

APPENDICES

APPENDICES

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-7365

ANTHONY L. JACKSON, et al.,
Plaintiffs-Appellees,

versus

MAGNOLIA BROKERAGE COMPANY, et al.,
Defendants-Appellants.

Appeal from the United States District Court
For the Northern District of Alabama

(November 21, 1984)

Before GODBOLD, Chief Judge, RONEY, Circuit Judge, and TUTTLE, Senior Circuit Judge.

O R D E R :

IT IS ORDERED that the application for 10% allowance to judgment pursuant to Title 12, Code of Alabama, Section 12-22-72 (1975) be, and the same hereby is, GRANTED.

The Fifth Circuit decided in *Proctor v. Gissendaner,* 587 F.2d 182 (5th Cir. 1979), that the Alabama statute which provides for the addition of 10% of a judgment which is stayed and unsuccessfully appealed is binding in a federal appellate court under *Erie v. Tompkins,* 304 U.S. 64, 82 L.Ed. 1188 (1938). This Court has adopted the decisions of the Court of Appeals for the Fifth Circuit rendered prior to October 1, 1981 as binding precedent of this Court, subject to overrule only by the court sitting *en banc. Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981). Accordingly, this Court is bound by *Proctor. See Locke v. Allstate Ins. Co.,* 696 F.2d 1340 (11th

Cir. 1983) ; *King v. Ford Motor Co.*, 604 F.2d 317 (5th Cir. 1979) . *See also Walters v. Inexco Oil Co.*, 725 F.2d 1014 (5th Cir. 1984) ; *but see Affholder v. Southern Rock*, ... F.2d ..... (5th Cir. 1984) [No. 83-4420].

APPENDIX II

A. STATES WHICH PERMIT RECOVERY OF PREJUDGMENT INTEREST IN TORT CASES

1. Alaska Stat. §§09.50.270; 45.45.010 (enacted 1968).
2. Cal. Civil Code §3291 (enacted 1982).
3. Colo. Rev. Stat. §13-21-101 (enacted 1935).
4. Conn. Gen. Stat. §37-3a (enacted 1981).
5. Hawaii Rev. Stat. §636-16 (enacted 1979).
6. Iowa Code §535.3 (enacted 1980).
7. La. Rev. Stat. Ann. §13-4203 (enacted 1916).
8. Me. Rev. Stat. Ann. tit. 14 §1602 (enacted 1969).
9. Md. Cts. & Jud. Proc. Code Ann. §11-301 (enacted 1980).
10. Mass. Ann. Laws Ch. 231 §6B, supp. §11 (enacted 1946).
11. Mich. Comp. Laws §600.6013 (enacted 1965).
12. Nev. Rev. State. §1 (b) 1974 (enacted 1979).
13. N.H. Rev. Stat. Ann. §524:1-b (enacted 1957).
14. N.J. Rev. Stat. §4:42-11 (b).
15. N.Y. Estates Power & Trust Law §5-4.3 (enacted 1967).
16. N.C. Gen. Stat. §24-5 (enacted 1981).
17. Ohio Rev. Code Ann. §1343.03 (enacted 1982).
18. Okla. Stat. tit. 12, §727 (2) (enacted 1971).
19. Pa. Con. Stat. §2.31 Rule 2.38 (1979).
20. R.I. Gen. Laws §9.21-10 (enacted 1958).
21. Tenn. Code Ann. §47-14-123 (enacted 1979).
22. Utah Code Ann. §15-1-4; 7-8-27-44 (enacted 1975).
23. Va. Code 8.01-382 (enacted 1979).
24. W. Va. Code §56-3-31 (enacted 1981).
25. Wis. Stat. §807.01 (enacted 1980).

B. PARTIAL LIST OF FEDERAL CASES WHICH RECOGNIZE THE RECOVERABILITY OF PREJUDGMENT INTEREST IN CASES ARISING UNDER FEDERAL LAW.

1. *Rodgers v. United States,* 332 U.S. 371 (1947). (Recognition of general proposition that federal courts may exercise equitable powers to grant prejudgment interest in certain cases arising under federal law.)
2. *Bricklayers' Pension Trust Fund v. Taiariol,* 671 F.2d 988, 989 (6th Cir. 1982) (Labor-Management Relations Act of 1947 and the Employment Retirement Income Security Act of 1974.)
3. *Olsen v. Shell Oil Co.,* 708 F.2d 976 (5th Cir. 1983) (Outer Continental Shelf Lands Act)
4. *Moore-McCormack Lines, Inc. v. Richardson,* 295 F.2d 583, 592-595 (2nd Cir. 1961), cert. denied 368 U.S. 989 (1962) (Death On The High Seas Act)
5. *Noritake Co. v. M/V Hellenic Champion,* 627 F.2d 724, 728 (5th Cir. 1980) (Death On The High Seas Act)
6. *General Motors Corp. v. Devex Corp.,* 461 U.S. 648 (1983) (patent infringement)
7. *National Airlines, Inc. v. Stiles,* 268 F.2d 400 (5th Cir. 1959)
8. *Mayer v. Branniff Airways, Inc.,* 310 F.Supp. 194 (N.D. Ill. 1970)
9. *In re Air Crash Disaster Near Chicago,* M.D.L. 391 (N.D. Ill. 1979)

Supreme Court, U.S.
FILED
MAY 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-1088

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

vs.

ALAN WOODS and CARA WOODS,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

JOINT APPENDIX

L. VASTINE STABLER, JR.*
HATTIE E. KAUFMAN
CABANISS, JOHNSTON,
GARDNER, DUMAS & O'NEAL
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Counsel for Petitioner

CARLTON T. WYNN*
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700 City Federal Building
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(205) 328-5330
Counsel for Respondents

* Counsel of Record

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

PETITION FOR CERTIORARI FILED DECEMBER 17, 1985
CERTIORARI GRANTED MARCH 24, 1986

45pp.

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Order of the United States Court of Appeals for the Eleventh Circuit granting Appellee's Motion for penalty assessment .....*Petition for Certiorari, Appendix A, p. A-1*

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APPENDIX A

BURLINGTON NORTHERN RAILROAD COMPANY
v. ALAN WOODS AND CARA WOODS

Docket Entries in
Circuit Court of Jefferson County,
Bessemer, Alabama

10/12/82 Summons and Complaint

10/15/82 Amendment to Complaint

11/16/82 This case transferred to U. S. District Court #CV 82 C2415S

Docket Entries in
United States District Court
Northern District of Alabama
Southern Division

9/27/83 Motion of plff to file amendment to complaint with exhibit attached, filed-cs-afp — 10/21/83 GRANTED (CLEMONS); Entered 10/24/83-cm-afp

1/13/84 FINAL JUDGMENT, dated 01/13/84, based on special verdict returned by the jury, that judgment is entered in favor of plff, Alan Woods and against deft Burlington Northern Railroad Company, in the amount of $300,000.00; and judgment entered in favor of plff Cara Woods and against deft Burlington Northern Railroad Co. in amount of $5,000.00; costs are taxed against deft for which execution shall issue, filed (CLEMON); Entered 01/13/84-cm-afp

1/23/84 Motion of deft, Burlington Northern Railroad, for judgment notwithstanding the verdict, or, in the

alternative, for a new trial, filed-cs-afp
— 6/29/84 OVERRULED (CLEMON); Entered 07/03/84-cm-afp

7/24/84 Notice of Appeal of deft from Order entered 07/03/84 filed - dpb

7/24/84 Motion of deft for stay of execution pending appeal and for approval of a Supersedeas Bond filed-cs-dpb (del to Clemon)
— 08/06/84 GRANTED (CLEMON); ENTERED 08/08/84 - cm - dpb

7/25/84 Certified copy of Notice of Appeal, Order appealed from and docket entries mailed to Clerk-USCA; copy of transmittal letter, Notice of Appeal and docket entries mailed to attys of record - dpb

8/8/84 Supersedeas Bond ($34,750.00) approved by the Court and filed - dpb

9/23/85 Certified copy of ORDER, USCA, entered 09/19/85, that BY THE COURT: Appellees' motion for 10% penalty assessment pursuant to Alabama Statute is GRANTED (VANCE, JOHNSON and MORGAN) filed - dpb

9/23/85 Certified copy of ORDER, USCA, entered 09/19/85, that appellants' motion to stay further proceedings is DENIED; appellants' alternative motion for oral argument on appellees' motion for assessment of statutory penalty is DENIED, the question is controlled by binding precedent (VANCE) filed - dpb

10/3/85 Certified copy of JUDGMENT, USCA, entered 08/16/85 and issued as mandate 10/01/85 with slip Opinion and Bill of Costs attached, that the judgment of the District Court is AFFIRMED; further,

that defts-appellants pay to plffs-appellees the costs on appeal (VANCE, JOHNSON and MORGAN) filed; record received - dpb

11/12/85 Stipulation of the parties that payment of the $30,500 statutory affirmance penalty ordered by the USCA is being withheld pending resolution by the Supreme Court, filed-snh

Docket Entries in
United States Court of Appeals
for the Eleventh Circuit

7/24/84 Notice of Appeal filed

8/16/85 Judgment on Appeal entered - Judgment Below Affirmed

8/26/85 Appellee's Motion for Assessment of Statutory Penalty - filed

8/30/85 Response to Appellee's Motion for Assessment of Statutory Penalty - filed

8/30/85 Appellant's Motion for Stay of Proceedings or in the Alternative for Oral Argument - filed

9/5/85 Appellant's Petition for Panel Rehearing filed

9/19/85 Order denying appellant's motion to stay further proceedings; order denying appellants alternative motion for oral argument

9/19/85 Order granting appellee's motion for 10% penalty assessment - entered

9/23/85 Petition for Rehearing denied

11/14/85 Stipulation of the parties that payment of the $30,500 statutory affirmance penalty is being withheld pending resolution by the Supreme Court - filed

APPENDIX B

IN THE CIRCUIT COURT FOR THE TENTH
JUDICIAL CIRCUIT OF ALABAMA
(BESSEMER DIVISION)

Civil Action No. CV 82-453

Alan Woods & Cara Woods,
Plaintiffs,

vs.

Louisville & Nashville Railroad
Company; City of Pensacola, Florida;
"X", the person, firm, corporation
or partnership responsible for paving,
street repair, surface preparation,
of the street known as Main Street,
near Jefferson Street, in Pensacola,
Florida, prior to the date of August 14, 1982,
all of whose names are yet unknown to
plaintiffs, but, when ascertained, will
be added by amendment,
Defendants.

COMPLAINT

1. Come now the plaintiffs and allege that on or about August 14, 1982, in the City of Pensacola, Escambia County, Florida, while plaintiffs were travelling West along Main Street, the juncture of pavement and railroad tracks was so negligently and/or wantonly prepared or maintained by said defendants, as to cause plaintiffs' vehicle to turn over, directly causing injuries and damages to plaintiffs, as enumerated hereinbelow.

2. Plaintiffs allege that said pavement was applied in such a negligent and/or wanton manner by defendants as to create huge mounds and deep crevices along the tracks, creating an extremely dangerous and grossly uneven surface, characterized by

ruts, promontories, holes and crevices, all disguised and caused by the overcoating of pavement.

3. Plaintiff, Alan Woods, was caused to suffer great physical pain and suffering and is severely injured, having a dislocated right shoulder, requiring surgery, and resulting in loss of employment and wages and causing great expense to himself, in and about his efforts to care for said injuries, all directly resulting from defendants' negligence and/or wantonness.

4. Plaintiff, Cara Woods, alleges that as a direct result of defendants' negligence and/or wantonness, she was severely injured in that she was bruised and contused and suffered great physical pain and mental anguish.

5. Plaintiff, Alan Woods, alleges that he lost the consortium of his wife, Cara Woods, as a direct result of the injuries caused by defendants' negligence and/or wantonness.

6. Plaintiff, Cara Woods, alleges that she has lost the consortium of her husband, Alan Woods, as a direct result of the injuries, loss of employment, and pain and suffering her husband has suffered, caused by defendants' negligence and/or wantonness.

WHEREFOR, Plaintiff, Alan Woods, claims of the defendants the sum of Fifty Thousand ($50,000.00) Dollars, exclusive of costs and interest.

WHEREFOR, Plaintiff, Cara Woods, claims of the defendants the sum of Five Thousand ($5,000.00) Dollars, damages exclusive of costs and interest.

/s/ MAC PARSONS

/s/ WILLIAM J. WYNN
Attorneys for Plaintiffs
1285-E Hueytown Road
Hueytown, Alabama 35023
(205) 491-8170

PLAINTIFFS DEMAND A TRIAL BY STRUCK JURY IN THIS CAUSE.

/s/ MAC PARSONS

/s/ WILLIAM J. WYNN

Plaintiffs' Address:

1325 King George Drive
Alabaster, Alabama 35007

Serve Defendant, Louisville & Nashville Railroad Company at:

4100 Vanderbilt Road
Birmingham, Alabama 35207

Serve Defendant, City of Pensacola, Florida at:

City of Pensacola
Legal Department
330 South Jefferson (P.O. Box 12910)
Pensacola, Florida 32521

APPENDIX C

IN THE CIRCUIT COURT FOR THE TENTH
JUDICIAL CIRCUIT OF ALABAMA
(BESSEMER DIVISION)

Civil Action No. CV 82-453

Alan Woods & Cara Woods,
Plaintiffs,

vs.

Louisville & Nashville Railroad
Company; City of Pensacola, Florida;
Burlington Northern Railroad Company;
et. al.,
Defendants.

AMENDMENT TO COMPLAINT

Come now the Plaintiffs, Alan Woods and Cara Woods, and hereby amend their complaint by adding as party Defendant, in each paragraph, the Burlington Northern Railroad Company.

/s/ MAC PARSONS

/s/ WILLIAM J. WYNN
Attorneys for Plaintiffs
1285-E Hueytown Road
Hueytown, Alabama 35023
(205) 491-8170

Plaintiffs' Address:

1325 King George Drive
Alabaster, Alabama 35007

Serve Defendant, Burlington Northern Railroad Company at:

30 South 18th Street
Birmingham, Alabama 35233

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV 82-C-2415-S

Alan Woods and Cara Woods,
Plaintiffs,

vs.

Burlington Northern Railroad Company, a corporation, et al.,
Defendants.

AMENDMENT TO THE COMPLAINT

Come the plaintiffs in the above styled cause, and amend their complaint as last amended, by the plaintiff, Alan Woods, claiming of the defendants as compensatory damages, TWO HUNDRED THOUSAND DOLLARS ($200,000.00), exclusive of interest and costs, and by the plaintiff, Cara Woods, claiming of the defendants as compensatory damages, FIVE THOUSAND DOLLARS ($5,000.00), exclusive of interest and costs. Plaintiff, Alan Woods, claims of the defendants as punitive damages, TWO HUNDRED THOUSAND DOLLARS ($200,000.00), exclusive of interest and costs, and the plaintiff, Cara Woods, claims of the defendants as punitive damages, FIVE THOUSAND DOLLARS ($5,000.00), exclusive of interest and costs.

MAC PARSONS, WILLIAM J. WYNN

and

HARE, WYNN, NEWELL & NEWTON
Attorneys for Plaintiffs

By: /s/ Carlton T. Wynn
700 City Federal Building
Birmingham, Alabama 35203
(205) 328-5330

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 82-C-2415-S

Alan Woods and Cara Woods,
Plaintiffs,

vs.

Burlington Northern Railroad Company,
Defendant.

FINAL JUDGMENT

Based on the special verdict returned by the jury herein, JUDGMENT is hereby ENTERED in favor of plaintiff, ALAN WOODS, and against defendant, BURLINGTON NORTHERN RAILROAD COMPANY, in the amount of Three Hundred Thousand and no/100 Dollars ($300,000.00); and JUDGMENT is hereby ENTERED in favor of plaintiff, CARA WOODS, and against defendant, BURLINGTON NORTHERN RAILROAD COMPANY, in the amount of Five Thousand and no/100 Dollars ($5,000.00).

The costs of this action are hereby taxed against defendant for which execution shall issue.

DONE this 13th day of January, 1984.

/s/ U. W. Clemon
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 82-C-2415-S

Alan Woods and Cara Woods,
Plaintiffs,

vs.

Burlington Northern Railroad Company,
Defendant.

SPECIAL VERDICT

1. Was there negligence on the part of defendant, Burlington Northern Railroad Company, which was a legal cause of damage to plaintiff Alan Woods?

Yes X No____

2. Was there negligence on the part of defendant, Burlington Northern Railroad Company, which was a legal cause of damage to plaintiff Cara Woods?, Yes X No____

If your answers to both Question 1 and Question 2 are "NO," your verdict is for defendant, and you should not go any further except to date and sign this verdict form and return it to the courtroom. If your answer to Question 1 is "YES," go to Question 3. If your answer to Question 1 is "NO," Skip Questions 3, 4, and 5 and go to Question 6.

3. Was any negligence on the part of plaintiff Alan Woods also a legal cause of his damage?

Yes____ No X

If your answer to this Question is "YES," go to Question 4. If your answer is "NO," Skip Question 4 and go to Question 5.

4. State the percentage of any negligence, which was a legal cause of damage to plaintiff Alan Woods, that you charge to:

Burlington Northern Railroad Company_____%

Alan Woods _____%

TOTAL MUST BE 100%

5. What is the total amount (100%) of any damages sustained by plaintiff Alan Woods and caused by the incident in question.

$300,000.00

In determining the total amount of damages, do not make any reduction because of the negligence, if any, of plaintiff Alan Woods. If you have found Alan Woods negligent in any degree, the Court in entering judgment will reduce Alan Woods' total amount of damages (100%) by the percentage of negligence which you found to be chargeable to Alan Woods.

6. Was any negligence on the part of plaintiff Cara Woods also a legal cause of her damage?

Yes____ No X

If your answer to this Question is "YES," go to Question 7. If your answer is "NO," Skip Question 7 and go to Question 8.

7. State the percentage of any negligence, which was a legal cause of damage to plaintiff Cara Woods, that you charge to:

Burlington Northern Railroad Company_____%

Cara Woods _____%

TOTAL MUST BE 100%

8. What is the total amount (100%) of any damages sustained by plaintiff Cara Woods and caused by the incident in question.

$5,000.00

In determining the total amount of damages, do not make any reduction because of the negligence, if any, of plaintiff Cara Woods. If you have found Cara Woods negligent in any degree, the Court in entering judgment will reduce Cara Woods' total amount of damages (100%) by the percentage of negligence which you found in chargeable to Cara Woods.

SO SAY WE ALL this 12 day of January, 1984.

Lonnie Butler
Foreperson

UNITED STATES DISTRICT COURT
FOR THE
NORTHERN DISTRICT OF ALABAMA

Case Number: CV-82-C-2415-S

Alan Woods and Cara Woods

vs.

Burlington Northern Railroad Company

CLERK'S COURT MINUTES

This action came on for trial on January 10, 1984, before the Court and a jury, Honorable U.W. Clemon, United States District Judge, presiding, and the issues having been duly tried;

It is ORDERED and ADJUDGED that a written judgment will be entered by the Court based on the special interrogatories propounded to the jury.

DATED: January 12, 1984 James E. Vandegrift, Clerk

Birmingham, Alabama /s/ James B. Dunford

Court Reporter: Margo Nelson DEPUTY CLERK

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 82-C-2415-S

Alan Woods and Cara Woods,
Plaintiffs,

vs.

Burlington Northern Railroad Company,
Defendant.

MOTION OF DEFENDANT BURLINGTON NORTHERN RAILROAD COMPANY FOR A JUDGMENT NOTWITHSTANDING THE VERDICT, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

Comes now Burlington Northern Railroad Company, defendant in the above-styled cause, having at the close of the plaintiffs' evidence and at the close of all the evidence, moved the Court to direct a verdict in its favor, which motions were denied, and thereafter a verdict having been returned by the jury on January 12, 1984, in favor of plaintiff Alan Woods against defendant in the amount of $300,000.00 and in favor of plaintiff Cara Woods against defendant in the amount of $5,000.00, moves to have said judgments entered on January 13, 1984, set aside and that judgment be entered in accordance with defendant's motions for directed verdict. This motion is made on each and all of the grounds asserted in support of said motions for directed verdict.

In the alternative, and if its motion for judgment notwithstanding the verdict is denied, defendant moves the Court to set aside the verdict against defendant and the judgments entered thereon, and to grant this defendant a new trial.

In support of its motion for a new trial, defendant assigns the following grounds separately and severally that:

1. The verdict of the jury against defendant is contrary to the law and evidence of this case.

2. The verdict of the jury against defendant is contrary to the great weight of the evidence.

3. The verdict of the jury against defendant is excessive.

4. The finding of the jury that the plaintiff was not guilty of contributory negligence is contrary to the great weight of the evidence.

5. The verdict of the jury against defendant is so excessive as to indicate bias, prejudice, or passion on the part of the jury.

6. There was insufficient evidence to permit the jury to determine that the defendant had a legal duty to maintain the pavement adjacent to the railroad track at the point of the accident. In the absence of any such evidence, any determination that defendant was negligent could only have been based upon the jury's conjecture and speculation.

7. There was insufficient evidence to permit the jury to determine that the accident would not have occurred but for the condition of the pavement adjacent to the railroad tracks. In the absence of such evidence, any determination by the jury that any negligence on the part of defendant proximately caused the plaintiffs' injuries could only be based on the jury's conjecture and speculation.

8. The jury erred, capriciously or ignorantly, in basing its verdict against defendant upon speculation and/or bias and/or prejudice and/or sympathy.

9. There was an irregularity in the proceedings of the Court, by which defendant was prevented from having a fair trial, in that the Court permitted evidence of other motorcycle accidents which occurred at a remote location far from the location of the accident in question to be considered by the jury as evidence against defendant.

10. There was an irregularity in the proceedings of the Court, by which defendant was prevented from having a fair trial, in that the Court permitted evidence of motorcycle accidents wich occurred subsequent to the accident in question to be considered by the jury as evidence against defendant.

11. There was an irregularity in the proceedings of the Court, by which defendant was prevented from having a fair trial, in that the Court permitted evidence of motorcycle accidents which occurred subsequent to the accident in question and which had been admitted solely to impeach the testimony of Mr. Bill Padley to be considered by the jury as substantive evidence (Plaintiffs' Exhibit 17.)

12. There was an irregularity in the proceedings of the Court, by which defendant was prevented from having a fair trial, in that the Court permitted evidence of other motorcycle accidents which occurred at a location remote from the location of the accident to be presented to the jury without testimony of the witness.

13. There was an irregularity in the proceedings of the Court, by which defendant was prevented from having a fair trial, in that the Court permitted photographs depicting the tracks at a remote location (Plaintiffs' Exhibits 1 through 7) to be considered by the jury as evidence against defendant.

14. There was an irregularity in the proceedings of the Court, by which defendant was prevented from having a

fair trial, in that the Court permitted evidence of a complaint relating to warning signs at a crossing far from the location of this accident (Plaintiffs' Exhibits 37 and 38) to be considered by the jury as evidence against defendant.

15. There was an irregularity in the proceedings of the Court, by which defendant was prevented from having a fair trial, in that the Court permitted Sections 129-7 and 129-8 of the Pensacola City Code to be admitted into evidence (Plaintiffs' Exhibits 31 and 32) and to be considered by the jury as evidence against this defendant.

16. There was an irregularity in the proceedings of the Court, by which defendant was prevented from having a fair trial, in that the Court admitted into evidence photographs (Plaintiffs' Exhibits 1 through 7) which had not been identified by plaintiffs as potential exhibits at trial by October 14, 1983, as required by this Court's Pre-Trial Order entered on July 29, 1983.

17. There was an irregularity in the proceedings of the Court, by which defendant was prevented from having a fair trial, in that the Court admitted into evidence certain accident reports (Plaintiffs' Exhibit 17), which had not been seen by defendant's attorneys prior to the day of trial, and which had not been designated as potential exhibits at trial by October 14, 1983, as required by this Court's Pre-Trial Order entered on July 29, 1983.

18. There was an irregularity in the proceedings, by which plaintiff was prevented from having a fair trial in that the Court applied its Pre-Trial Order unevenly by enforcing the following portion of the Pre-Trial Order:

> Except to the extent written notice to the contrary is filed with the Clerk of the Court within five days after receiving such list, each party shall be deemed to have agreed (for purposes of this litigation only):

(a) that the originals of the listed exhibits are authentic within FRE 901 and 902;

(b) that a duplicate, as defined in FRE 1001, of the listed exhibits is admissible to the same extent as would be the original;

(c) that any of the listed exhibits purporting to be records described in FRE 803(6) meet the requirements of such rule without extrinsic evidence;

(d) that any of the listed exhibits purporting to be correspondence were sent by the purported sender and received by the purported recipient on approximately the dates shown or in accordance with customary delivery schedules;

(e) that any listed photographs fairly and accurately portray the scene therein depicted as of the time when made;

(f) that any listed bills for services or materials are reasonable in amount for the services or materials therein billed; and,

(g) that each of the listed documents is admissible at trial.

and failing and refusing to enforce the following portion of the pre-trial order:

Unless specifically agreed between the parties or allowed by the court for good cause shown, the parties shall be precluded from offering as substantive evidence any exhibit not so identified.

thereby ruling that all documents would be admitted regardless of the application of rules of evidence (Plaintiffs' Exhibits 1-7, 37-38).

19. There was an irregularity in the proceedings of the Court, by which defendant was prevented from having a fair trial, in that the Court admitted into evidence two provisions of the Pensacola City Code (Plaintiffs' Exhibits 31 and 32) which had not been designated as potential exhibits at trial by October 14, 1983, as required by this Court's Pre-Trial Order entered on July 29, 1983.

21. The trial court erred in overruling defendant's objection to the following portion of plaintiffs' closing argument:

> That company doctor is never going to pass him, got men out there laid off 100% strong as this man ever thought about being and who do you think they are going to call back first?

22. The trial court erred in overruling defendant's objection to the following portion of plaintiff's closing argument:

> The tracks were exactly the way this police officer said they were. They were popped up, buckled, had holes in them, city was telling them "fix it", we got a complaint, "Why don't you get out there and do it?" Well, what's it going to take to do it? What's it going to take? I submit to you it takes people like you sitting in juries to make them get out there and fix it.

23. The trial court erred in overruling defendant's objection to the plaintiffs' use of demonstrative evidence in the course of rebuttal closing argument which had not been identified in the first oral argument, thereby preventing counsel for the defendant an opportunity to respond.

24. The trial court erred in charging the jury as follows:

> The City of Pensacola requires that railroad companies plank or pave their tracks at street crossings in the city, and that they must keep such street crossings "in good repair and so as to permit vehicles to pass across same without damage or hindrance."

25. The trial court erred in charging the jury as follows:

> Therefore, under Florida law, a railroad company is liable for injuries to persons as a direct result of its negligent breach of its duty, imposed by state law, to maintain and keep in good condition its crossings over public streets.

26. The trial court erred in charging the jury as follows:

> Since the defendant in this case had a duty imposed by law, you the jury must determine whether Burlington Northern negligently breached that duty, *and,* if so, whether its negligence directly caused the injuries which the plaintiffs have suffered.

27. The grant of a new trial is essential to prevent irreparable injustice in this case.

28. The trial of this case did not do justice between the parties.

29. The evidence weighs so heavily against the verdict against defendant that a new trial should be ordered.

30. Considering all the grounds stated above cumulatively, the ends of justice would better be served by granting a new trial.

/s/ L. Vastine Stabler, Jr.

/s/ Frank D. McPhillips

Attorney for defendant Burlington Northern Railroad Company

1900 First National-Southern
Natural Building
Birmingham, Alabama 35203
(205) 252-8800

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV 82-C-2415-S

Alan Woods and Cara Woods,
Plaintiffs,

vs.

Burlington Northern Railroad Company,
Defendant.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Burlington Northern Railroad Company, defendant above named, hereby appeals to the United States Court Of Appeals For The Eleventh Circuit from the judgment and the final order denying defendant's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for a New Trial entered in this action on July 3, 1984.

/s/ L. Vastine Stabler
/s/ Michael C. Quillen
Attorneys for Burlington Northern
Railroad Company

OF COUNSEL:

CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL
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Birmingham, Alabama 35203
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APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV 82-C-2415-S

Alan Woods and Cara Woods,
Plaintiffs,

vs.

Burlington Northern Railroad Company,
Defendant.

MOTION FOR STAY OF EXECUTION PENDING APPEAL AND FOR APPROVAL OF A SUPERSEDEAS BOND

Comes now the defendant, Burlington Northern Railroad Company, a corporation, and moves this Court for an order staying execution of the judgment entered in this action on January 13, 1984, pending appeal and for an order granting leave to the defendant to file a supersedeas bond in the amount of Three Hundred Forty-Five Thousand Seven Hundred Fifty Dollars ($345,750.00) as security.

/s/ Michael C. Quillen
Attorney for Burlington
Northern Railroad Company

OF COUNSEL:

CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL
1900 First National - Southern
Natural Building
Birmingham, Alabama 35203
(205) 252-8800

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action No. CV 82-C-2415-S

Alan Woods and Cara Woods,
Plaintiffs,

vs.

Burlington Northern Railroad Company,
Defendant.

SUPERSEDEAS BOND

KNOW ALL MEN BY THESE PRESENTS, that we, Burlington Northern Railroad Company, a corporation, as Principal and St. Paul Fire and Marine Insurance Company, a Corporation, as Surety, are held and firmly bound unto Alan Woods and Cara Woods in the sum of $345,750.00 to be paid to the said Alan Woods and Cara Woods, their attorneys, successors, executors, administrators or assigns, to which payment to be well and truly made, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 23rd day of July, 1984.

WHEREAS, on the 13th day of January, 1984 a Judgment in the amount of $300,000.00 in favor of Alan Woods and $5,000.00 in favor of Cara Woods, and on June 29, 1984, the Court overruled the motion of the defendant Burlington Northern Railroad Company for a new trial, and the said defendant has duly filed a notice of appeal from said judgment to the Court of Appeals for the Eleventh Circuit; and,

WHEREAS, the said Burlington Northern Railroad Company, Inc., desires a stay of all proceedings in the above entitled cause until the determination of the said appeal,

NOW, THEREFORE, the condition of this bond is such that if the said Burlington Northern Railroad Company, as Appellant, shall prosecute its appeal with effect and shall satisfy the said judgment in full together with costs, interest and damage for said delay if said appeal is dismissed or if the judgment is affirmed, and shall satisfy in full such modification of the Judgment and costs, interest and damages as may be adjudged and awarded by the Court of Appeals, then this obligation to be void, otherwise to remain in full force and effect.

BURLINGTON NORTHERN RAILROAD COMPANY, A CORPORATION, DEFENDANT AS PRINCIPAL

By: /s/ Michael C. Quillen
Its Attorney

ST. PAUL FIRE AND MARINE INSURANCE COMPANY, A CORPORATION

By: _____
Its Attorney in Fact, as Surety

The foregoing Bond is hereby approved this _____ day of July, 1984, to stand as a Supersedeas until the final determination of the Appeal.

_____
Hon. U. W. Clemon
United States District Court

APPENDIX J

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7510

D. C. Docket No. 82-2415

Alan Woods and Cara Woods,
Plaintiffs-Appellees,

versus

Burlington Northern Railroad Company, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Alabama

Before VANCE and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby, AFFIRMED;

It is further ordered that defendants-appellants pay to plaintiffs-appellees, the costs on appeal to be taxed by the Clerk of this Court.

Entered: August 16, 1985
For the Court: Spencer D. Mercer, Clerk

By: /s/ Warren A. Godfrey
Deputy Clerk

ISSUED AS MANDATE: OCTOBER 1, 1985

APPENDIX K

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 84-7510

Alan Woods and Cara Woods,
Plaintiffs-Appellees,

vs.

Burlington Northern Railroad Company, et al.,
Defendants-Appellants.

MOTION FOR STAY OF PROCEEDINGS OR IN THE ALTERNATIVE FOR ORAL ARGUMENT

Comes now Burlington Northern Railroad Company, Defendant-Appellant in the above-styled case, and moves the Court for a stay of the proceedings to resolve Plaintiff-Appellees' Motion for Assessment of Statutory Penalty or, in the alternative, for an order allowing oral argument to be held to resolve said motion. As grounds for this motion, Defendant-Appellant says as follows:

1. The United States Supreme Court has granted review in *Aetna Life Insurance Company v. Lavoie,* 470 So. 2d 1060 (Ala. 1984) for the purpose, *inter alia,* of determining the constitutionality of the Alabama statutory affirmance penalty made the basis of Plaintiffs-Appellees' motion. *Aetna Life Insurance Company v. Lavoie,* 53 U.S.L.W. 3847 (No. 84-1601, June 4, 1985).

2. The issues raised in a constitutional attack of the statutory affirmance fee are extremely complex and oral argument of these issues will benefit the Court.

WHEREFORE, Defendant-Appellant respectfully prays for an order staying the resolution of the Motion for Assessment of

Statutory Penalty of the Plaintiffs-Appellees until the issue is resolved by the United States Supreme Court. To the extent that the United States Supreme Court fails to dispose of the issue, Defendant-Appellant requests oral argument of this issue.

WE RESPECTFULLY REQUEST ORAL ARGUMENT

/s/ Kenneth D. Davis
Attorney for Defendant-Appellant Burlington Northern Railroad Company

OF COUNSEL:

CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL
1900 First National - Southern
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(205) 252-8800

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Response to Appellee's Motion for Assessment of Statutory Penalty has been duly served upon the following by hand-delivery this 29th day of August, 1985:

Carlton T. Wynn
Francis H. Hare, Jr.
Alva C. Caine
Hare, Wynn, Newell & Newton
700 City Federal Building
Birmingham, Alabama 35203

/s/ Kenneth D. Davis
Of Counsel

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CASE NO. 84-7510

ALAN WOODS and CARA WOODS,
Plaintiffs-Appellees,

vs.

BURLINGTON NORTHERN RAILROAD
COMPANY, et al.,
Defendants-Appellants.

On Appeal From The United States District
Court For The Northern District Of Alabama

APPELLANT'S PETITION FOR PANEL REHEARING

NOT A PREFERENCE CASE

L. Vastine Stabler, Jr.
Michael C. Quillen
Kenneth D. Davis

Attorneys for Appellant
Burlington Northern Railroad
Company

OF COUNSEL:

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PETITION FOR REHEARING

This Court's affirmance of the judgment on a jury verdict failed to consider a crucial issue in the case by neglecting to rule on the propriety of a punitive damages argument made by plaintiffs' counsel. Additionally, the Court resolved other issues incorrectly due to a misconception of the facts. With such deficiencies, this Court must reconsider its decision and grant this petition for rehearing.

SUMMARY OF ARGUMENT

This Court's opinion affirms the judgment entered in favor of Alan and Cara Woods in spite of the existence of reversible error in the record. The trial transcript of this case reveals that counsel for the plaintiffs made an argument for the recovery of punitive damages even though the trial judge had ruled that there were no issues in the case for which punitive damages could be awarded. Moreover, District Judge Clemon overruled defense counsel's objection to this argument. Although federal law holds that it is an abuse of discretion for a trial court to permit this type of argument, this Court affirmed the district court judgment.

The Court also misunderstood the events which led to the admission of certain photographs into evidence. First, it was stated that counsel for Burlington Northern Railroad Company (hereinafter "Burlington Northern") disregarded the pretrial order when in fact it was counsel for the plaintiffs who sought

first to introduce evidence in contravention of the order. Second, the Court understood that the evidence admitted addressed an issue which the defendant expected to litigate which was the general condition of the track near Comandencia. *Woods v. Burlington Northern Railroad Company,* No. 84-7510, slip. op. at 5861 (11th Cir. August 16, 1985). In fact, Burlington Northern was forced to litigate the condition of the general area after the photographs were admitted into evidence. However, the true issue in the case was the condition of the track only at Comandencia where the incident occurred. Because of these misconceptions, this Court affirmed the rulings of Judge Clemon.

I. THE OPINION DID NOT DEAL WITH APPELLANT'S PRINCIPAL CLAIM AS TO IMPROPER ARGUMENT

The most egregious aspect of plaintiffs' counsel's closing argument was the "teach them a lesson" argument made despite Judge Clemon's ruling that punitive damages were not recoverable. The panel failed to address this critical issue in its opinion even though such an argument is wholly improper and constitutes reversible error. A federal trial judge commits reversible error when he permits a punitive damages argument when such damages are not recoverable. *Vanskike v. ACF Industries, Inc.,* 665 F.2d 188 (8th Cir. 1981); *Sturm v. Clark Equipment Company,* 547 F.Supp. 144 (W.D. Mo. 1982); *Smith v. Courter,* 531 S.W.2d 743 (Mo. 1976) (banc); *Louisville & Nashville Railroad Company v. Wade,* 280 Ala. 453, 195 So.2d 101 (1967).

The panel's opinion does not provide any guidance as to the rule which it intends to follow or establish regarding this issue. We do not know whether the Court disagrees with the *Vanskike* opinion and those from other jurisdictions or whether the Court believes that plaintiffs' attorney made no plea for punitive damages. If the Court chooses to part from the *Vanskike* ruling

and thereby cloud the distinction between punitive and compensatory damages, then so be it. On the other hand, there is simply no way to distinguish the impermissible argument in the present case from that in *Vanskike*. At any rate, by reaching a decision without discussing this crucial issue, the Court affirms a lower court ruling in the face of reversible error.

The holding of this Court is directly contrary to *Vanskike*. There, the plaintiff's attorney also employed a "teach them a lesson argument", by reminding the jury that it should serve as the conscience for the American public. That court, although recognizing that the trial judge was in a better position to regulate arguments of counsel, affirmatively held that the decision to permit the punitive damages argument was an abuse of discretion. The trial court was reversed. The Court's reasoning is expressed in the following quotation from *Smith v. Courter*, 531 S.W.2d 743, 748 (Mo. 1976) (banc), which is particularly applicable to the present case:

> Nevertheless, juries cannot be told directly or in effect that they may consider punishment or deterrence as an element of damages and include a sum of money in their verdict so as to punish the defendant or deter others from like conduct unless the pleadings, evidence and instructions warrant the separate submission of punitive damages under the law. To do otherwise, would eliminate the distinction between compensatory and punitive damages, a distinction long part of the law of this state, and would cloud every verdict to a point where the court could not know whether the compensatory damage verdict did or did not include a punitive sum.
>
> Of course, a court cannot now know the mind of each juror as he goes about the task of deciding upon the amount of the verdict, and jurors cannot be heard to impeach their own verdicts. So it comes of importance that jurors not be told they can include as part of their award

> an element of damages that the law does not allow. Therefore, they should not be motivated by argument to hold as one of their objectives, in arriving at the amount of their verdict, the punishment of the defendant or the deterrence of others.

Additionally, *Vanskike* noted that rules governing argument of counsel are procedural and are determined by federal law. Thus, the holding was not based on a determination of state law but rather is grounded in traditional federal rules. These rules should be applied to the present case.

The panel merely concluded in its opinion that the portions of the argument brought to its attention were permissible. The Court did not distinguish the argument made in this case from the argument held to be in error in *Vanskike*. Moreover, additional statements by plaintiffs' counsel were equally improper. The argument must be taken as a whole. When the many improprieties are coupled with the punitive damages argument, which is clearly reversible error, the argument as a complete unit must be regarded as a plea to the sympathies of the jury and must not be permitted by this Court.

Significantly, Judge Clemon gave his express voice of approval to the punitive damages argument of the plaintiff. The plaintiff's attorney made the following argument:

> City was telling them fix it, we've got a complaint, why don't you get out there and do it. Well, what's it going to take, what's it going to take? I submit to you it takes people like you sitting in juries to make them get out there and fix it.
>
> Mr. Stabler: Your Honor, I object to that argument.
>
> THE COURT: Objection is overruled.

R. Vol. VIII, p. 580.

The error was thus compounded by the approval of the Court.

A fair system of justice demands that one party not be subjected to punitive damages unless the law accords the other party the right to such an award. Arguments of counsel which blur the distinction between compensatory and punitive damages to the extent that it is meaningless should not be permitted. Trial judges which allow such argument should be reversed.

This Court in its original opinion failed to address perhaps the most important issue raised by this appeal. We respectfully request that careful review be made of the argument of plaintiffs' counsel.

II. THE ORIGINAL OPINION ERRONEOUSLY DETERMINED THAT THE DISTRICT COURT PROPERLY MODIFIED THE PRETRIAL ORDER

The original opinion of the panel concluded that Judge Clemon did not abuse his discretion by the manner in which the pretrial order was enforced. As a basis for the decision, the Court apparently determined that counsel for Burlington did not comply with the pretrial order. (See, Slip Opinion, p. 5861.) The opinion states:

> Counsel cannot show cavalier disregard for a district court's pretrial requirements and reasonably expect this court to extricate them from an unhappy aftermath.

Woods v. Burlington Northern Railroad Company, supra. at 5861.

It is hard for counsel for the defendant to accept the accusation that we cavalierly disregarded the pretrial order when there is no showing that we failed to comply with anything. Under the terms of the order the plaintiffs could not introduce exhibits without producing a list of exhibits by October 14, 1983. It is undenied that such a list was not furnished.

Judge Clemon's order did not impose a requirement for objections to be filed unless the list was received from the offering

party by October 14, 1983. There was nothing before the trial court or the parties to which the defendant could object. Since the evidence offered by the plaintiff was already inadmissible *under the express terms of the pretrial order,* how and why should the defendant be required to file further objections?

The Court must assess these events in light of its own lessons provided in the original opinion:

> Compliance with prescribed pretrial procedures is of increasing importance to the effective administration of justice in the face of burgeoning caseloads. *Trial judges and opposing litigants have a right to expect that the court's orders will be carefully followed in order that the business of the court may be handled expeditiously and fairly.* (Emphasis added).

Woods v. Burlington Northern Railroad Company, supra, at 5861.

After October 14, 1983, Burlington Northern's expectation in light of the pretrial order was that any exhibit offered by the plaintiff would be excluded.

Subsequently, Judge Clemon modified the pretrial order by allowing the plaintiff to offer exhibits even though not listed according to the terms of the order. Moreover, Judge Clemon summarily admitted the evidence because the defendant had not filed objections. Yet, the conditions precedent to the filing of objections had not been met. Under the express terms of the order, the evidence offered by plaintiff was already inadmissible.

At this time, we do not take issue with Judge Clemon's modification of the pretrial order permitting exhibits to be offered even though identified in an untimely manner and in a manner other than that prescribed by the order. However, the simultaneous expansion of the scope of the requirement to file written objections to include exhibits which were untimely and improperly produced is patently unfair.

Thus, it is not Burlington Northern which failed to comply with the terms of the original pretrial order. Burlington Northern's only sin was compliance with the terms of the original pretrial order. The failure of the railroad company to predict the manner in which the order would be modified was the basis for Judge Clemon's decision to admit the plaintiff's exhibits and is now the basis for the Eleventh Circuit opinion. The panel's failure to analyze the entire context within which the exchange of exhibits and objections were to be made resulted in a holding diametrically opposed to the basis upon which the holding was made. The party relying on the pretrial order has been punished while the party ignoring the pretrial order is rewarded.

III. THE APPELLATE COURT ERRED IN DETERMINING THAT CERTAIN PHOTOGRAPHS WERE RELEVANT TO THE ISSUE IN CONTROVERSY

With respect to the photographs at issue in this case, the Court has again failed to perceive the actual course of events at trial. In ruling that these photographs were relevant, the Court ascertained that "(B)urlington disputed this generalized state of deterioration." Implicit in this statement is that Burlington came to trial prepared to defend the condition of the track throughout a four-block area. In fact, the erroneous rulings of the trial judge dictated that the railroad defend this broad area.

The photographs at issue were admitted at an early stage of trial during the direct testimony of Officer Rick Whisenant. R. Vol. VI, pp. 78-84. Significantly, Judge Clemon failed to base his decision on principles of relevancy but instead admitted the photographs under his interpretation of the pretrial order. From this point on, Burlington was forced to adopt a defense which included the entire area. Had the trial judge ruled correctly, this "generalized state" would have never been at issue. Surely an adjustment in defense strategy which attempts to mitigate the

effect of erroneous rulings by the trial court is not grounds for finding that a defendant was not prejudiced by the rulings.

The record in this case clearly reveals that the admission of the photographs identified as Trial Exhibits 2-10 adversely affected the substantial rights of the railroad. When an accident occurs, the railroad should only have to defend the condition of the track where the incident happened. *Cf. Lawrence v. Florida East Coast Railway Company,* 346 So.2d 1012 (Fla. 1977). The condition of the track some thirty to one hundred yards away is of no import, especially since the angle at which traffic approaches the track is entirely different from one point to another. That is, any defects shown in the pictures offered by the plaintiff were far less likely to cause accidents than the jury was led to believe because traffic does not ordinarily pass over track at the area depicted in the erroneously admitted photographs. Moreover, the plaintiffs' own evidence was inconsistent as to whether the pictures contained scenes similar to the track at Comandencia. See e.g., R. Vol. VI, p. 143. Absent clear proof of similarity, the pictures were not relevant and should not have been admitted. *Lawrence v. Florida East Coast Railway Company, supra.*

IV. CONCLUSION

It is respectfully submitted that for the foregoing reasons this Court erred in its affirmance of the district court judgment. This petition should be granted and the judgment on the plaintiffs' verdict should be reversed.

Respectfully submitted,

/s/ Michael C. Quillen

Attorneys for Appellant
Burlington Northern Railroad
Company

OF COUNSEL:

CABANISS, JOHNSTON, GARDNER,
DUMAS & O'NEAL
1900 First National-Southern
Natural Building
Birmingham, Alabama 35203
(205) 252-8800

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing Appellant's Petition for Panel Rehearing has been duly served upon counsel for plaintiffs by hand-delivering same to Mr. Carlton Wynn, Mr. Alva C. Caine, and Mr. Francis H. Hare, Jr., HARE, WYNN, NEWELL & NEWTON, 700 City Federal Building, Birmingham, Alabama 35203, this the 4th day of September, 1985.

OF COUNSEL

APPENDIX M

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7510

Alan Woods and Cara Woods,
Plaintiffs-Appellees,

vs.

Burlington Northern Railroad Company, et al.,
Defendants-Appellants.

On Appeal from the United States District Court for the
Northern District of Alabama

ORDER

Appellants' motion to stay further proceedings is DENIED.

Appellants' alternative motion for oral argument on appellees' motion for assessment of statutory penalty is DENIED. The question is controlled by binding precedent.

/s/ Robert S. Vance
United States Circuit Judge

APPENDIX N

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 84-7510

Alan Woods and Cara Woods,
Plaintiffs-Appellees,

vs.

Burlington Northern Railroad Company, et al.,
Defendants-Appellants.

Appeal from the United States District Court for the
Northern District of Alabama

ON PETITION FOR REHEARING

(September 23, 1985)

Before VANCE and JOHNSON, Circuit Judges, and MORGAN, Senior Circuit Judge.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby Denied.

ENTERED FOR THE COURT:

Robert S. Vance
United States Circuit Judge

APPENDIX O

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

Civil Action Number 82-C-2415-S

Alan Woods and Cara Woods,
Plaintiffs,

vs.

Burlington Northern Railroad Company,
Defendant.

STIPULATION

The parties by and through their attorneys of record stipulate to the following facts:

1. That the judgment of $300,000 in favor of Alan Woods and $5,000 in favor of Cara Woods, along with the interest and costs accrued thereon, has been paid in full by Burlington Northern Railroad Company, with the exception of the statutory affirmance penalty.

2. That payment of the $30,500 statutory affirmance penalty ordered by the Eleventh Circuit Court of Appeals pursuant to Alabama Code § 12-22-72 is being withheld pending resolution of further proceedings to be filed in the United States Supreme Court by the defendant regarding whether such an affirmance penalty is valid.

/s/ Carlton T. Wynn
Attorney for Alan Woods and
Cara Woods

/s/ L. Vastine Stabler, Jr.
Attorney for Burlington Northern
Railroad Company

APPENDIX P

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Case No. 84-7510

Alan Woods and Cara Woods,
Plaintiffs-Appellees,

vs.

Burlington Northern Railroad Company, et al.,
Defendants-Appellants.

STIPULATION

The parties by and through their attorneys of record stipulate to the following facts:

1. That the judgment of $300,000 in favor of Alan Woods and $5,000 in favor of Cara Woods, along with the interest and costs accrued thereon, has been paid in full by Burlington Northern Railroad Company, with the exception of the statutory affirmance penalty.

2. That payment of the $30,500 statutory affirmance penalty ordered by the Eleventh Circuit Court of Appeals pursuant to Alabama Code § 12-22-72 is being withheld pending resolution of further proceedings to be filed in the United States Supreme Court by the defendant regarding whether such an affirmance penalty is valid.

/s/ Carlton T. Wynn
Attorney for Alan Woods and
Cara Woods

L. Vastine Stabler, Jr.
Attorney for Burlington Northern
Railroad Company

(6)

Supreme Court, U.S.
FILED
MAY 24 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1088

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

vs.

ALAN WOODS and CARA WOODS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER

L. VASTINE STABLER, JR.*
HATTIE E. KAUFMAN
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Counsel for Petitioner

* Counsel of Record

St. Louis Law Printing Co., Inc., 411 No. Tenth Street 63101 314-231-4477

66 pp

QUESTIONS PRESENTED

I. WHETHER SECTION 12-22-72 OF THE *CODE OF ALABAMA* (1975), WHICH IMPOSES A MANDATORY PENALTY OF TEN PERCENT OF THE AMOUNT OF JUDGMENT ON AN UNSUCCESSFUL DEFENDANT-APPELLANT, WHILE IMPOSING NO SIMILAR PENALTY ON PLAINTIFF-APPELLANTS, IS UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT.

II. WHETHER THE STATUTORY AFFIRMANCE PENALTY IS A RULE OF PROCEDURE AND NOT APPLICABLE TO ACTIONS IN FEDERAL COURT.

PARTIES TO THE PROCEEDING

A list of parties and affiliated or related parties is printed at page ii, Petition for Writ of Certiorari.

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No. 85-1088

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

VS.

ALAN WOODS and CARA WOODS,
Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER

OPINIONS BELOW

The Opinion of the Eleventh Circuit Court of Appeals, related to the substantive issues in the case, appears at 768 F.2d 1287 (11th Cir. 1985) and is printed at Appendix D of the Petition for Writ of Certiorari. The Order of the Eleventh Circuit denying Petitioner's motions for a stay of proceedings or in the alternative for oral argument is printed at Appendix M of the Joint Appendix. (J.A. 39) The Order of the Eleventh Circuit granting Respondents' motion for ten percent penalty assessment pursuant to Alabama statute is printed at Appendix A of

the Petition for Writ of Certiorari. The Order of the Eleventh Circuit denying rehearing is printed at Appendix N of the Joint Appendix. (J.A. 40)

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1)(1966), to review questions involving the constitutionality of an Alabama statute and the application of that statute in federal court. The order of the United States Court of Appeals for the Eleventh Circuit granting the ten percent statutory affirmance penalty was entered on September 19, 1985, and the Petition for Certiorari was filed December 17, 1985, within the ninety-day period allowed by 28 U.S.C. § 2101(c)(1982).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The applicable constitutional provisions, statutes and rules are printed as the Appendix to this brief.

STATEMENT OF THE CASE

Alan Woods and Cara Woods brought suit on October 15, 1982 in the Tenth Judicial Circuit of Alabama, Bessemer Division, against the Burlington Northern Railroad Company (hereinafter "Burlington Northern") and others to recover damages for injuries sustained in a motorcycle accident. (J.A.4) The case was removed to the United States District Court for the Northern District of Alabama on November 15, 1982. On December 28, 1982, the Woods deleted the other defendants, and Burlington Northern was the sole remaining defendant.

The case was tried in January 1984, and the jury returned a verdict of $300,000.00 in favor of Alan Woods and $5,000.00 in favor of Cara Woods. Judgment was entered based on the jury verdict on January 13, 1984. (J.A.9) Burlington Northern filed

a motion for judgment notwithstanding the verdict or, in the alternative, for a new trial, on January 23, 1984. (J.A.14) This motion was overruled on June 29, 1985.

On July 24, 1985, Burlington Northern filed a Notice of Appeal in the district court along with a Motion for a Stay of Execution Pending Appeal and a Bond for Costs on Appeal and Supersedeas Bond. (J.A.21-24) Under the terms of the Bond, the Woods were guaranteed by the bonding company that the judgment, interest and costs of judgment and appeal would be paid. On August 16, 1985, the Eleventh Circuit Court of Appeals affirmed the judgment of the trial court. (A.6 of Petition for Writ of Certiorari and J.A.25)

On August 26, 1985, the Woods filed a motion for assessment of statutory penalty, seeking to recover a penalty of ten percent of the judgment pursuant to Section 12-22-72 Code of Alabama (1975) [hereinafter "Alabama Affirmance Penalty"]. (A.2 of Petition for Writ of Certiorari) Burlington Northern responded to this motion on August 30, 1985. (A.4 of Petition for Writ of Certiorari) The response contended that the Alabama Affirmance Penalty was unconstitutional under both the Equal Protection Clause and the Due Process Clause and that it is a procedural rule and is inapplicable in federal court.[1]

Burlington Northern filed a Motion for Stay of Proceedings or in the Alternative for Oral Argument on the issue of the Alabama Affirmance Penalty on August 30, 1985. (J.A.27) Burlington Northern also filed a Motion for Panel Rehearing on September 5, 1985. (J.A.29)

The Woods' motion for statutory penalty was granted on September 19, 1985. (A.1 of Petition for Writ of Certiorari). On

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[1] Additionally, the response noted that the judgment was not final at the time of the Woods' motion. The Eleventh Circuit subsequently denied Burlington Northern's Petition for Panel Rehearing thus mooting the issue of timeliness.

the same date, the court denied Burlington Northern's motions for stay of proceedings and for oral argument. (J.A. 39) The Petition for Rehearing was denied September 23, 1985. (J.A.40)

In November 1985, both parties filed stipulations in the District Court (November 12) and the Court of Appeals (November 14), stating that the entire judgment, with the exception of the Alabama Affirmance Penalty, had been paid. Payment of the penalty was being withheld pending resolution of the issue before this Court. (J.A.41 and 42)

Burlington Northern petitioned this Court for a Writ of Certiorari on December 17, 1985, and Certiorari was granted March 24, 1986.

Because the constitutionality of a state statute is drawn into question by the present action, 28 U.S.C. § 2403(b)(1978) may be applicable. No federal court has certified to the Attorney General of the State of Alabama the fact that the constitutionality of an Alabama statute has been drawn into question. A copy of this brief has been served on the Attorney General of the State of Alabama.

SUMMARY OF THE ARGUMENT

I.

In order to analyze whether a state statute violates the Equal Protection Clause of the Fourteenth Amendment, it is necessary to determine the character of the right disadvantaged by the statute, the state interest promoted by the statute, and the relationship between the classifications made by the statute and its stated goals.

Equal access to an established appellate system is a fundamental right under the Constitution. *Rinaldi v. Yeager,* 384 U.S. 305 (1966). Because of the importance of this right, the Alabama Affirmance Penalty, which restricts this right by treating different groups of appellants disparately, would need to be precisely tailored to the promotion of a compelling state interest in order to be constitutional. *Plyler v. Doe,* 457 U.S. 202 (1982); *Shapiro v. Thompson,* 394 U.S. 618 (1969). Analysis shows, however, that neither of the state interests claimed to be promoted by the Alabama statute is sufficiently compelling or substantial to justify interference with a basic right. *Lindsey v. Normet,* 405 U.S. 56 (1972). Moreover, the statute creates classifications that are both overinclusive and underinclusive in their effect, so that they bear no rational relationship to any policy goals of the statute. *Jimenez v. Weinberger,* 417 U.S. 628 (1974).

The Alabama statute also violates the Due Process Clause of the Fourteenth Amendment by erecting a barrier that amounts to an impermissible penalty against those who choose to exercise their statutory right to appeal adverse judgments. *North Carolina v. Pearce,* 395 U.S. 711 (1969). Due Process must be observed in the appellate system. *Griffin v. Illinois,* 351 U.S. 12 (1956); *Evitts v. Lucey,* 53 U.S.L.W. 4101 (U.S. Jan. 21, 1985), *reh. den.* ____ U.S. ____, 105 S. Ct. 1784. Because the Alabama statute penalizes all appellants in a certain class, without regard to any concern for culpability, an irrebuttable

presumption of improper appellant behavior is created, thus denying the affected class members any opportunity to be heard, and resulting in a taking of property without Due Process of law. *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974).

II.

The Eleventh Circuit stands alone in applying affirmance penalty statutes in federal court. *Affholder, Inc. v. Southern Rock, Inc.,* 746 F.2d 305 (5th Cir. 1984); *Nordmeyer v. Sanzone,* 315 F.2d 780 (6th Cir. 1963).

If the Federal Rules of Procedure conflict with state provisions, the Federal Rules will be followed in federal court as long as they are validly within the scope of the Rules Enabling Act. *Hanna v. Plumer,* 380 U.S. 460 (1965). Alabama's Affirmance Penalty covers ground that is already fully covered by the Federal Rules of Appellate Procedure. The applicable Rules regulate procedure, and thus fall within the Enabling Act's purview. *Sibbach v. Wilson & Co.,* 312 U.S. 1 (1941). Therefore, the federal court should not have followed the Alabama Affirmance Penalty.

Even if the Alabama Affirmance Penalty did not directly conflict with the Federal Rules of Appellate Procedure, under the principles of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), and *Hanna v. Plumer,* 380 U.S. 460 (1965), the federal courts should not apply the state statute. Use of the statute does not affect the outcome of the litigation. *Guaranty Trust Co. v. York,* 326 U.S. 99 (1945). The Alabama statute is not bound up with any substantive rights or duties granted by the laws of the state. *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541 (1949). The federal policy favors uniformity of procedure under the Federal Rules and there is no countervailing state policy which is bound up with enforcing the Alabama Affirmance Penalty in federal court. *Byrd v. Blue Ridge Rural Elec-*

tric Cooperative, 356 U.S. 525 (1958). Failure to use the state statute in federal court has no effect on forum shopping and would not produce any resultant inequitable treatment of citizens and noncitizens. *Hanna v. Plumer,* 380 U.S. 460 (1965). The promulgation of rules of appellate procedure by a federal court is not an unconstitutional exercise of power over substantive state law of the type prohibited by *Erie. Hanna v. Plumer,* 380 U.S. 460 (1965).

ARGUMENT

I. Introduction: The Purpose And Effect Of The Alabama Affirmance Penalty

The questions raised in this case involve Section 12-22-72 Code of Alabama (1975), which provides:

> When a judgment or decree is entered or rendered for money, whether debt or damages, and the same has been stayed on appeal by the execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court; and, upon the appeal of any judgment or decree entered or rendered for any amount of commissions, fees or compensation fixed or determined by the trial court and taxed or allowed as costs, if the appellate court affirms the judgment or decree of the court below and the payment thereof has been stayed on such appeal, judgment shall be entered by the appellate court against all or any of the obligors on the bond for the amount affirmed, 10 percent damages thereon and the costs of the appellate court; provided, however, that if no supersedeas bond has been executed on such appeal, the appellate court, in the event of affirmance, shall increase the amount so allowed as costs in the court below in the judgment or decree appealed from by adding thereto 10 percent damages thereon and the costs of the appellate court.

The statute originated from An Act of the Mississippi Territory Concerning Writs of Error, passed December 18, 1811. Toulmin's Digest, tit. 39, ch. III, § 1 (1823). (A. 4-5) The first statute provided for damages of ten percent on all affirmed judgments, without regard to whether there had been a stay. A later act, passed in 1820, added the proviso that the penalty was

to be applied in the Supreme Court only if the judgment below had been suspended. Toulmin's Digest, tit. 36, ch. XXVI, §11 (1823). (A.- 5)

Until 1975, the Alabama Affirmance Penalty was the sole monetary sanction dealing with frivolous appeals.[2] When the Alabama Rules of Appellate Procedure were adopted, however, Rule 38 for the first time provided for the specific assessment of damages against an appellant whom the appellate court deemed to have brought an appeal that was frivolous. (A.- 8) The Alabama Affirmance Penalty remained intact, and thus the duplicative procedures have continued to exist side by side since that time.

A 1951 amendment somewhat clouds the picture. It adds the language:

> provided, however, that if no supersedeas bond has been executed on such appeal, the appellate court, in the event of affirmance, shall increase the amount so allowed as costs in the court below in the judgment or decree appealed from by adding thereto 10 percent damages thereon and the costs of the appellate court.

The statute as amended might be interpreted as applying not only where defendants have posted a supersedeas bond, but also in those cases in which no stay has been obtained. Note, *Mandatory 10-Percent Penalty on Unsuccessful Appeals of Money Judgments in Alabama—Constitutional and Policy Considerations,* 32 Ala. L. Rev. 197 (1980). Nevertheless, the statute has

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[2] Rule XI of the 1830 Alabama Rules of Practice in the Supreme Court sought to avoid expending the court's time on appeals brought only for purposes of delay, by providing that the judgment underlying such appeals could be summarily affirmed. (A.- 7) Rule XI was the direct predecessor of Rule 17 of the Alabama Revised Rules of Practice in the Supreme Court (A. 7-8), which was replaced and expanded upon by Rule 38 of the Alabama Rules of Appellate Procedure when the new rules were adopted in 1975.

not yet been invoked, to our knowledge, except in cases where there has been a suspended judgment. The amendment was added shortly after the decision in *City of Birmingham v. Bowen,* 254 Ala. 41, 47 So. 2d 174 (1950) (on motion to modify final judgment of affirmance)(per curiam), which held that the Alabama Affirmance Penalty applied to municipalities, even though they could obtain a stay without posting bond. We surmise from subsequent applications of the Alabama Affirmance Penalty that the amendment was designed to conform to the *Bowen* opinion, so that the penalty can apply when there is a stay of a money judgment whether or not supersedeas is obtained.

The Alabama cases have discussed two possible purposes for the Alabama Affirmance Penalty. In a 1920 case, the Alabama Supreme Court stated that "This statute . . . was evidently intended to penalize frivolous or delay appeals." *Montgomery Light & Water Power Co. v. Thombs,* 204 Ala. 678, 684, 87 So. 205, 211 (1920)(addenda). This analysis was reiterated in *Chapman v. Rivers Construction Co.,* 284 Ala. 633, 645, 227 So. 2d 403, 415 (1969)(on rehearing). The courts have assessed the penalty, however, without regard to whether the appeal is frivolous. *Lloyd v. Stewart,* 258 Ala. 627, 60 So. 2d 911 (1952), 64 So. 2d 884 (1953)(on rehearing).

In a 1934 case, the Alabama Supreme Court stated that the effect on frivolous appeals was not the statute's only purpose, although no alternative rationale was suggested. *Snellings v. Builders' Supply Co.,* 229 Ala. 1, 155 So. 858 (1934). Another purpose was finally articulated in *City of Birmingham v. Bowen,* 254 Ala. at 47, 47 So. 2d at 180, which announced that the "real purpose" of the statute was to provide additional damages for affected plaintiff-appellees.

There are other provisions under Alabama law that already afford protection of the litigated property of the plaintiff who successfully defends against an appeal. In the first place, the

defendant must provide a supersedeas bond in order to obtain a stay. The surety must be approved by the clerk of the circuit court, and the amount must equal one hundred fifty percent of the judgment if it does not exceed $10,000, or one hundred twenty-five percent of the judgment if it is greater than $10,000. The bond assures payment of the judgment, interest and costs of both the trial and appellate court. Rule 8, Ala. R. App. P. (A. 8-9) Thus, before the judgment may be stayed, the plaintiff receives protection against financial insolvency of the defendant as well as against the possibility that the defendant might abscond or avoid payment. Second, the costs of delay in payment of the judgment are compensated by the assessment of twelve percent simple per annum interest on the judgment running from the date of judgment to the date of payment. Rule 37, Ala. R. App. P.; Ala. Code § 8-8-10 (1975). (A.- 9) (A. 6-7) Finally, there is also the provision under Rule 38 of the Alabama Rules of Appellate Procedure, already discussed, which authorizes assessment of damages on frivolous appeals.

The class of persons who must pay the Alabama Affirmance Penalty include those against whom a money judgment is affirmed, where the judgment has been stayed, either by operation of a supersedeas bond (*Snellings v. Builders' Supply Co.*, 229 Ala. 1, 155 So. 858), or by virtue of the special status accorded to governmental entities (*City of Birmingham v. Bowen*, 254 Ala. 41, 47 So. 2d 174). There are two companion statutes which require that a penalty be paid on affirmance of a judgment for recovery of real or personal property in the amount of ten percent of the alternative value of such property. Ala. Code §§ 12-22-73, 12-22-74 (1975). Otherwise, the penalty does not apply to plaintiff-appellants or to defendants who appeal from non-monetary awards. Neither does it apply against defendants who unsuccessfully appeal from money judgments when no stay is obtained, even if the judgment remains unsatisfied pending appeal.

The penalty is imposed only when there is a complete affirmance of the judgment below, and any modification of the judgment makes it inapplicable. *Chapman v. Rivers Construction Co.,* 284 Ala. at 644-45, 227 So. 2d at 414-15.

Basically three aspects of the Alabama Affirmance Penalty are objectionable. First, the statute punishes a class of persons who have done nothing wrong, while sparing others who should be subjected to the penalty. Second, it creates unfair economic barriers to access to appellate courts. Finally, it awards "windfall" damages to plaintiffs regardless of whether they have suffered harm. These objectionable features impact the constitutionality of the statute in different ways, as will be demonstrated in the discussion that follows.[3]

II. The Alabama Affirmance Penalty Is Unconstitutional Under The Equal Protection And Due Process Clauses Of The Fourteenth Amendment.

This Court has recently recognized that the question of the constitutionality of the Alabama statute "raise[d] important issues which . . . must be resolved." *Aetna Life Insurance Co. v. LaVoie,* 54 U.S.L.W. 4381, 4386 (U.S. April 22, 1986). This brief will discuss the principles of Equal Protection and Due Process, with respect to the ways in which the Alabama Affirmance Penalty violates them, and thus violates the Constitution.

A. The Alabama Affirmance Penalty Violates the Equal Protection Clause of the Fourteenth Amendment

The cases of this Court suggest a three-step analysis of Equal Protection:

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[3] The Alabama Supreme Court has upheld the constitutionality of the statute, although the decision contained no analysis of the Equal Protection or Due Process issues. *Central of Georgia Railway Co. v. Steed,* 287 Ala. 64, 76-77, 248 So. 2d 110, 120-21 (1971)(on rehearing).

1. What is the character of the right disadvantaged?

2. What is the state interest that the statute seeks to promote?

3. Is the statutory classification rationally related to the governmental interest?

Each of these three facets will be discussed in relation to the Alabama Affirmance Penalty.

1. Character of the Right: Equal access to the appellate courts is a fundamental right

The nature of the right disadvantaged affects the standard of scrutiny applied both to the governmental interest which the statute seeks to promote and to the precision with which the classification created by the statute must rationally relate to the governmental interest.

We refer to the opinion of this Court in *Plyler v. Doe*, 457 U.S. 202 (1982), which sets out the various standards of review depending on the character of the right disadvantaged. If the right is "fundamental," then "it is appropriate to enforce the mandate of equal protection by requiring the State to demonstrate that its classification has been precisely tailored to serve a compelling governmental interest." *Id.* at 217. In those statutes which affect "enduring" concerns in the constitution, but do not rise to the level of fundamental rights, the classification must reflect "a reasoned judgment consistent with the ideal of equal protection [that] may fairly be viewed as furthering a substantial interest of the State." *Id.* at 217-18, 218 n. 16. If neither a fundamental right nor an enduring concern is involved, then the inquiry is whether "the classification at issue bears some fair relationship to a legitimate public purpose." *Id.* at 216.[4]

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[4] This Court has consistently stated that even this least exacting level of inquiry is not a "toothless" one. *Logan v. Zimmerman Brush Co.*,

Fundamental rights need not be explicit in the Constitution. *Plyler v. Doe,* 457 U.S. at 217 n.15; *Harris v. McRae,* 448 U.S. 297, 322 n.25 (1980) (right to equal access to the franchise in state elections). They have been described as those, like marriage, of "basic importance in our society." *Boddie v. Connecticut,* 401 U.S. 371, 376 (1971); *Zablocki v. Redhail,* 434 U.S. 374 (1978). Fundamental rights are part of our heritage and basic in our scheme of values. *Aptheker v. Secretary of State,* 378 U.S. 500, 505-06 (1964) (right to travel abroad). They are those rights included in the "fundamental theory of liberty." *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925) (right to send children to private school).

We submit that the Alabama Affirmance Penalty invades the fundamental right of equal access to an established appellate court system. From the beginning, the rights protected by this highest level of scrutiny have included:

> access to the courts of the country for the protection of . . . persons and property . . . that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same . . . condition.

Barbier v. Connolly, 113 U.S. 27, 31 (1885); *see also, Maxwell v. Dow,* 176 U.S. 581, 590 (1900); *Bell's Gap Railroad Co. v. Pennsylvania,* 134 U.S. 232, 238 (1890).

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455 U.S. 422, 439 (1982) (Blackmun, J., separate opinion); *Trimble v. Gordon,* 430 U.S. 762, 767 (1977); *Mathews v. Lucas,* 427 U.S. 495, 510 (1976). Statutes tested under this analysis must still "rationally advanc[e] a reasonable and identifiable governmental objective." *Schweiker v. Wilson,* 450 U.S. 221, 235 (1981); *Logan v. Zimmerman Brush Co.,* 455 U.S. at 439. The distinction must relate properly "to the consequences that flow from it." *Labine v. Vincent,* 401 U.S. 532, 551 (1971) (Brennan, J., dissenting), *reh den* 402 U.S. 990. The statute must be "carefully tuned to alternative considerations." *Trimble v. Gordon,* 430 U.S. at 772; *Mathews v. Lucas,* 427 U.S. at 513.

This Court has treated the right of access to the judicial system as an aspect of the First Amendment right to petition the government for redress of grievances. *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 741 (1983); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 513 (1972); *United Mine Workers v. Illinois State Bar Association*, 389 U.S. 217, 223 (1967).

Griffin v. Illinois, 351 U.S. 12 (1956) acknowledged the protected status of this right in the context of appellate review.[5] Holding that an appellate procedure which required a costly transcript violated Equal Protection by discriminating against the poor. Mr. Justice Black stated:

> Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.

Id. at 18.

This Court has specifically recognized that the right involved here is fundamental. The dispute in *Rinaldi v. Yeager*, 384 U.S. 305 (1966), dealt with the constitutionality of a provision requiring inmates to use a portion of their earnings in prison to repay the cost of transcripts furnished in their criminal trials. The Court noted that to impose this financial obligation on the inmates "inevitably burdens" appeals. The Court, through Mr. Justice Stewart, stated:

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[5] The principle of the right of access to an established appellate system has been frequently reiterated. *See e.g., Blackledge v. Perry*, 417 U.S. 21, 25 n. 4 (1974); *Mayer v. Chicago*, 404 U.S. 189, 193 (1971); *North Carolina v. Pearce*, 395 U.S. 711, 724 (1969); *Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969) (per curiam); *Lane v. Brown*, 372 U.S. 477, 483 (1963); *Burns v. Ohio*, 360 U.S. 252, 257 (1959).

> This Court has never held that the States are required to establish avenues of appellate review, but *it is now fundamental* that, once established, these avenues must be kept free of unreasoned distinctions. (Emphasis added).

Id. at 310.

A statute affecting a fundamental right may be unconstitutional even though the exercise of that right has not been totally abrogated. This Court has found it sufficiently objectionable if the additional risk or cost imposed by the statute has a chilling effect on a party's exercise of the basic right. *Jones v. Helms,* 452 U.S. 412, 426-27 (1981) (White, J. concurring); *Dunn v. Blumstein,* 405 U.S. 330, 340 (1972); *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Rinaldi v. Yeager,* 384 U.S. 305 (1966).

Here, the petitioner has been required to assume the risk of a penalty, or fine, in order to obtain judicial review of a judgment. Unquestionably, the high price charged to a defendant in the Alabama courts for undertaking an appeal "heavily burdens the statutory right" which is at the same time freely given to others. *Lindsey v. Normet,* 405 U.S. 56, 77 (1972). It unfairly discriminates against defendants who provide statutory assurances while seeking appellate review.[6]

2. State Interest: The interests promoted by the Alabama Affirmance Penalty are insufficient to sustain the constitutionality of the statute

Having identified the nature of the right restricted, it is next necessary to ascertain the interest of the state that is being promoted. If the state's interest is insufficiently compelling, or insufficiently substantial, such interest may not justify restriction

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[6] Even if the right restricted by the Alabama Affirmance Penalty were not a fundamental right, the analytic framework applied in this brief would still be appropriate, since the statute involved here will be shown to be devoid of any rational relationship to a legitimate governmental interest.

of a right which may be more important under the Constitution. For instance, a Connecticut statute creating a one-year residency requirement for welfare eligibility restricted a fundamental constitutional right to travel across state lines. The Court, in an opinion by Mr. Justice Brennan, noted that "any classification which serves to penalize the exercise of that right, unless shown to be necessary to promote a *compelling* governmental interest, is unconstitutional." *Shapiro v. Thompson,* 394 U.S. 618, 634 (1969).

One must ask whether either of the two stated purposes for the Alabama Affirmance Penalty — penalization of frivolous or delay appeals and provision of additional damages to plaintiff-appellees — reflects a governmental interest that justifies the resulting restriction upon the right of appeal of one class of litigants. We think not.

Frivolous Appeals. There is certainly a state interest in restricting frivolous appeals. The state is legitimately concerned with judicial efficiency as well as with preventing its citizens from being subjected to prolonged and useless litigation. But such an interest cannot be sustained at the expense of imposing unequal and unfair financial burdens on special groups of litigants. This Court ruled in 1897 that a statute imposing attorney's fees on defendant railroads which lost on appeal was unconstitutional:

> It is no sufficient answer to say that they are punished only when adjudged to be in the wrong. They do not enter the courts upon equal terms. They must pay attorney's fees if wrong; they do not recover any if right; while their adversaries recover if right and pay nothing if wrong. In the suits, therefore, to which they are parties they are discriminated against, and are not treated as others. They do not stand equal before the law. They do not receive its equal protection. All this is obvious from a mere inspection of the statute.

Gulf, Colorado & Santa Fe Railway Co. v. Ellis, 165 U.S. 150, 153 (1897).

In the same case this Court quoted a Mississippi holding:

> "The right of appeal cannot be fettered and clogged with reference to the parties litigant or the attitude they occupy as plaintiff or defendant. All litigants, whether plaintiff or defendant, should be regarded with equal favor by the law, and before the tribunals for administering it, and should have the same right to appeal with others similarly situated. All must have the equal protection of the law, and its instrumentalities. The same rule must exist for all in the same circumstances."

Id. at 161 (quoting *Chicago, St. Louis & New Orleans Railroad Co. v. Moss,* 60 Miss. 641, 646-47 (1882)).

This theme was reiterated the following term in *Atchison, Topeka & Santa Fe Railroad Co. v. Matthews,* 174 U.S. 96 (1899). The Court criticized statutes that would

> pick out one individual, or one corporation, and enact that whenever he or it is sued the judgment shall be for double damages, or subject to an attorney fee in favor of the plaintiff when no other individual or corporation is subjected to the same rule.

Id. at 104.

This is exactly what the Alabama statute does; it singles out defendant-appellants and subjects them to extra burdens as part of the appellate process.

This Court has more recently found that a statute requiring tenants to post a double bond in order to appeal an eviction, while raising no comparable bonding requirements for landlords who appeal, violates the Equal Protection Clause. *Lindsey v. Normet,* 405 U.S. 56 (1972). The amount of the

bond in *Lindsey* was not tied to potential losses of the landlord, and other provisions protected the landlord from the tenants' waste of the property, so that the court could "discern nothing in the special purposes of the...statute or in the special characteristics of the landlord-tenant relationship to warrant this discrimination." *Id.* at 78.

Additional Damages. If, on the other hand, we assume that the Alabama Affirmance Penalty is intended to provide additional damages to plaintiffs who were awarded judgments in the court below, it is difficult to see any state interest, let alone a compelling one, that is being served by such purpose. This penalty is not tied to the merits of the particular dispute. The following statement from *Lindsey v. Normet* is equally applicable to the present case:

> While a State may properly take steps to insure that an appellant post adequate security before an appeal to preserve the property at issue, to guard a damage award already made, or to insure a landlord against loss of rent if the tenant remains in possession, the double-bond requirement here does not effectuate these purposes since it is unrelated to actual rent accrued or to specific damage sustained by the landlord.

Id. at 77.

Presumably an affirmed judgment carries the imprimatur of both the trial and appellate courts to the effect that adequate compensatory and punitive damages have already been awarded. This extra ten percent lagniappe for the plaintiff simply adds to the award without a finding of additional damage to the plaintiff or fault of the defendant. In effect, the Alabama Affirmance Penalty amounts to an arbitrary and nondiscretionary additur. *See Dimick v. Schiedt,* 293 U.S. 474 (1935).

The Illinois statute which was struck down in *Lindsey v. Normet* was at least designed to deal with "unique factual and

legal characteristics of the landlord-tenant relationship that justify special statutory treatment inapplicable to other litigants." *Lindsey v. Normet,* 405 at 72. The Alabama Affirmance Penalty is tied to no special factual or legal situation, but is involved blindly in disputes which run the gamut of civil litigation. Hence, the case for unconstitutionality is even stronger than in *Lindsey v. Normet,* because the penalty is not focused to serve any substantive purpose.

3. Statutory Classification: The Alabama Affirmance Penalty discriminates against defendants who appeal from monetary damage awards

Once the state interest has been identified, it is possible to evaluate the rationality of the relationship between it and the classification established by the statute.[7]

To some extent the strictness of application of this element of rationality depends on the character of the right being restricted. For instance, a fundamental right can be restricted only by a classification "precisely tailored" to serving the compelling governmental interest. *Plyler v. Doe,* 457 U.S. 202, 217 (1982). The intermediate scrutiny requires a finding "that the classification reflects a reasoned judgment consistent with the ideal of equal protection." *Id.* at 217-18. And in other forms of state action there must be an "assurance that the classification at issue bears some fair relationship to" the governmental purpose. *Id.* at 216.

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[7] The nature of the state's interest can materially affect the rationality of the classification. *See e.g. Jimenez v. Weinberger,* 417 U.S. 628 (1974), which distinguished a Federal Social Security exclusion of benefits to illegitimate children (which violated equal protection) from Maryland's statutory limit of $250 per family on Aid to Families with Dependent Children (which did not violate equal protection, *Dandridge v. Williams,* 397 U.S. 471 (1970)) because the Maryland limitation was intended to restrict the availability of finite resources, while the Social Security Act provision had a different purpose, which lacked any rational relationship to its effects.

Whatever standard is applied, the classification created by the Alabama statute falls woefully short of bearing any rational relationship to serving either of the stated purposes.

Frivolous Appeals. A statute that overinclusively burdens those members of the class pursuing non-frivolous appeals and underinclusively leaves unburdened those outside the class whose appeals are frivolous cannot be supported. *Rinaldi v. Yeager,* 384 U.S. 305, 310 (1966).

The Alabama Affirmance Penalty is overinclusive because it carries an irrebutable presumption that all defendants who appeal and lose have done so frivolously. The simple fact that one loses an appeal does not, in itself, justify a conclusion that the appeal was frivolous. *Hughes v. Rowe,* 449 U.S. 5, 14 (1980)(per curiam). Moreover, because the amount of the penalty increases proportionately to the amount of judgment, the statute presumes that the larger the judgment, the more frivolous the appeal. Common experience demonstrates that, if anything, the reverse is true. A high judgment has inflicted greater injury on a defendant, and the size alone will often warrant inquiry into whether the defendant has indeed had a fair trial. Thus, the Alabama Affirmance Penalty not only is overinclusive as to the parties penalized, but it also compounds the irrationality by raising the penalty without justification.

The Alabama Affirmance Penalty is underinclusive because it does not necessarily reach all appeals that might be found to be frivolous. Appellants who were plaintiffs or who are appealing from a declaratory judgment or non-monetary equitable relief are not subjected to the penalty. Is there any reason to believe that frivolous or delay appeals are the exclusive province of defendants in cases affected by this statute,[8] as opposed to plaintiffs or to defendants in other kinds of cases?

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[8] Also, its companion statutes. Ala. Code §§ 12-22-73, 12-22-74 (1975). *See* text at 11.

The Alabama Affirmative Penalty is similar to the statute at issue in *Jimenez v. Weinberger,* 417 U.S. 628 (1974), which was aimed at preventing spurious benefits claims of illegitimate children. Inasmuch as spurious claims could be found in applications for benefits for legitimate as well as illegitimate children, this Court held that:

> the two subclasses...stand on equal footing, and the potential for spurious claims is the same as to both; hence to conclusively deny one subclass benefits presumptively available to the other denies the former the equal protection of the laws....

Id. at 637.

Since there is no correlation between the affected defendants' appeals and frivolous appeals, the Alabama Affirmance Penalty is not reasonably related to preventing delay or frivolous claims.[9]

The existence of Rule 38 of the Alabama Rules of Appellate Procedure[10], a rule which is indeed "precisely tailored" to compensate for the consequences of frivolous appeals, contributes to the irrationality of the Alabama Affirmance Penalty. Under that Rule, if the court finds the existence of frivoiousness, it must determine the amount of damages. When no damages under Rule 38 are assessed, as was the case here, there is a confirmation that the damages were needlessly added when the appeal was substantial. On the other hand, if and when damages are assessed under Rule 38, the Alabama Affirmance Penalty is surplusage.

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[9] *See also City of Cleburne v. Cleburne Living Center,* 53 U.S.L.W. 5022, 5026 (U.S. July 1, 1985); *United States v. Robel,* 389 U.S. 258, 266 (1967); *Shelton v. Tucker,* 364 U.S. 479, 488 (1960).

[10] The Federal Rule of the same number, which would have been the governing rule in this case, is almost identical to the state rule.

Additional Damages. The purpose of providing additional damages for affected plaintiff-appellees fares no better under analysis. The statutes and rules provide protection against uncollectability (by means of the supersedeas bond)[11] and against loss of use of the money because of delayed payment (through interest on the judgment).[12] It is hard to conceive of any damages not otherwise compensated that have been accrued by a plaintiff whose judgment is affirmed.[13] The classification is thus overinclusive as a remedy because appellants normally receive a windfall payment for no identifiable injury.

On the other hand, if some damage to the appellant were identified, it is impossible to distinguish its effect on the plaintiff whose judgment is affirmed (who is rewarded with a penalty) from one whose judgment is affirmed but modified (who gets no penalty). It is likewise irrational to assume that litigants in other classes of cases stand on a different footing with respect to any supposed damages. Therefore, the Alabama Affirmance Penalty is also underinclusive in terms of identifying those who might be damaged by delay.

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[11] Rule 8, Ala. R. App. P. (A. 8-9)

[12] Ala. Code § 8-8-10 (1975); Rule 37, Ala. R. App. P. (A. 6-7) (A. 9)

[13] This is in sharp contrast to the situation in *National Union of Marine Cooks & Stewards v. Arnold,* 348 U.S. 37 (1954), where there had been no supersedeas, but the judgment had not been paid prior to appeal. There, the Court specifically found that "Where the effectiveness of a money judgment is jeopardized by the judgment debtor, he has no constitutional right to an appeal extending that frustration." *Id.* at 44.

B. Section 12-22-72 Of The Code Of Alabama, Imposing A Statutory Affirmance Penalty, Violates The Due Process Clause Of The Fourteenth Amendment

Most of the controlling constitutional principles that relate to the Alabama Affirmance Penalty have been fully developed under the rubric of the Equal Protection Clause; however, there are two features which we submit violate Due Process whether or not they are deemed to be discriminatory under the Equal Protection Clause:

1. The Alabama Affirmance Penalty erects excessive and punitive obstacles in the way of access to court procedures.

2. The windfall award to the plaintiff of an additional ten percent of the affirmed judgment, without any requirement of culpability on the part of the defendant or injury to the plaintiff, creates liability based on a conclusive presumption of legal responsibility and amounts to a taking of property without Due Process of law.

Each of these features will be discussed.

1. Obstacles to Access: It is a violation of Due Process to discourage resort to the judicial system by levying a penalty against its use

Three lines of authority lead to a conclusion that Due Process is violated by the erection of punitive obstacles to appeal: i) the state which establishes an appellate system must comply with the requirements of Due Process, ii) access to the courts is a fundamental principle of Due Process, and iii) a rule or regulation which has a chilling effect on the exercise of a constitutional right is unconstitutional. The confluence of these lines of authority produces the result that the Alabama Affirmance Penalty violates Due Process.

Appellate Due Process. *Griffin v. Illinois,* 351 U.S. 12 (1956), established that the requirements of Due Process and

Equal Protection demand indigent defendants be provided with transcripts to enable them to file an appeal. The opinion of the Court noted, *inter alia,* that when a system of appeals is adopted, the requirements of Due Process must be met. *Id.* at 18. The ruling in that case did not necessarily depend on Due Process principles, however, because the Equal Protection Clause was sufficient to support the holding.

The Due Process feature of *Griffin v. Illinois* was implicitly adopted in *Boddie v. Connecticut,* 401 U.S. 371 (1971), and thoroughly explored in *Evitts v. Lucey,* 53 U.S.L.W. 4101 (U.S. Jan. 21, 1985), *reh. den.* ____ U.S. ____, 105 S. Ct. 1784, wherein it was held that the dismissal of an appeal from a criminal conviction because of the failure of counsel to file a timely statement of appeal was a violation of Due Process. Because no discriminatory conduct was involved, Equal Protection was inapplicable in *Evitts.* The petitioner in that case argued that because a state is not required to establish a system of appeals as of right, it is immune from constitutional scrutiny when it chooses to have such a system. *Id.* at 4105. In response to that argument, Mr. Justice Brennan stated for the Court:

> The right to appeal would be unique among state actions if it could be withdrawn without consideration of applicable due process norms. For instance, although a State may choose whether it will institute any given welfare program, it must operate whatever programs it does establish subject to the protections of the Due Process Clause. . . . Similarly, a State has great discretion in setting policies governing parole decisions, but it must nonetheless make those decisions in accord with the Due Process Clause. . . . In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution — and, in particular, in accord with the Due Process Clause.

Id.

Access to Courts. It is also established that denial of access to courts constitutes a violation of Due Process. In *Boddie v. Connecticut,* 401 U.S. 371 (1971), the issue was whether sixty dollar court costs for filing for a divorce violated Due Process when such fee had the practical effect of denying welfare recipients access to the court. The Court reasoned that access to courts was an incident of a meaningful opportunity to be heard and concluded "that the Due Process Clause of the Fourteenth Amendment requires that these appellants be afforded an opportunity to go into court to obtain a divorce . . . ." *Id.* at 382. See also *Wolff v. McDonnell,* 418 U.S. 539, 579 (1974), holding that legal assistance to inmates is constitutionally required in connection with petitions claiming violation of civil rights.

This concern for the unfettered use of the court system is not unique. Time and again this Court has stated that the imposition of a penalty for the exercise of a statutory or constitutional right was not to be tolerated. *United States v. Goodwin,* 457 U.S. 368, 372 (1982); *Bordenkircher v. Hayes,* 434 U.S. 357, 363 (1978); *Blackledge v. Perry,* 417 U.S. 21 (1974) (state cannot substitute more serious charges when appellant wins a new trial); *Griffin v. California,* 380 U.S. 609, 614 (1965) (prosecutor cannot comment on defendant's choice not to testify).

The same analysis was applied to poll tax cases, where the tax was found unconstitutional because it "exacted a price for the privilege of exercising the franchise." *Harman v. Forssenius,* 380 U.S. 528, 539 (1965). There, this Court held that "[i]t has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution." *Id.* at 540.

Chilling Effect. Having established both that the requirements of Due Process are controlling and that access to courts is a component of Due Process, the next inquiry is whether the Alabama Affirmance Penalty has the practical ef-

fect of constituting a burden on access which denies Due Process. Although the penalty is paid only after an appeal is lost, every appellant must consider the risk of payment in the equation leading to the decision to appeal. A good analogy in identifying the burden may be found in *Lindsey v. Normet,* 405 U.S. 56, 77 (1972), in which the Court determined that a double bond penalty "heavily burdens" the right of appeal.

Essentially, the Alabama Affirmance Penalty encumbers the use of appellate review by imposing a penalty, in the form of significant risk, on those who choose to exercise their right to seek review. This has been held to be "patently unconstitutional." *North Carolina v. Pearce,* 395 U.S. 711, 724 (1969). In the *Pearce* case, this Court held that "it would be a flagrant violation of the Fourteenth Amendment" to establish a policy whereby those who had their convictions set aside and were again found guilty on retrial were to be punished with harsher sentences. *Id.* at 723-24. Because the threat of a potential penalty would chill the exercise of the statutory right of appeal, such a policy would violate Due Process. *Id.*

In striking down a statute that put defendants at extra risk by demanding a jury trial, this Court explained that the chilling effect of such a statute was the real evil. It is not necessary for the threatened penalty actually to prevent a party from exercising his rights in the judicial forum; it is sufficient that the threat be enough to "encourage" one to forego that to which one is entitled. *United States v. Jackson,* 390 U.S. 570, 581-83 (1968).

2. Conclusive Presumptions: It is a violation of Due Process to determine liability on the basis of irrebuttable presumptions

Another aspect of Due Process needs to be considered where a plaintiff is being awarded ten percent additional damages without a finding of compensable injury to the plaintiff or culpable conduct on the part of the defendant.

The Alabama Affirmance Penalty creates an irrebuttable presumption of entitlement to damages. There is no way for a defendant-appellant to rebut this presumption and avoid the penalty.

> No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal.

Cole v. Arkansas, 333 U.S. 196, 201 (1948).

The same principle is recognized in civil cases. Sweeping presumtions have been found by this Court to violate the concept of Due Process because they deny the affected party any opportunity to overcome the adverse determination. *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974) (cannot presume that pregnancy impairs a teacher's fitness for work); *Department of Agriculture v. Murry,* 413 U.S. 508 (1973) (cannot presume that a family member's prior status as a dependant of a noneligible person makes the entire family able to afford food without food stamps); *Vlandis v. Kline,* 412 U.S. 441 (1973) (cannot presume that a prior nonresident is not now entitled to resident tuition status); *Stanley v. Illinois,* 405 U.S. 645 (1972) (cannot presume that unwed fathers are unfit parents).

Burlington Northern stands to be adjudged liable for $30,500 additional damages. The liability is arbitrary and unwarranted by any measure of substantive law. If a court is to impress additional liability, it must do so based on facts that support that determination. Here, however, no facts were presented and no mitigating factors were weighed. Because such irrebuttability strikes at the very heart of the Due Process concept—the right

of an opportunity to be heard—the Alabama Affirmance Penalty is, by its very terms, unconstitutional.[14]

III. The Alabama Affirmance Penalty Is A Rule Of Procedure And Not Applicable To Actions In Federal Court

The Court of Appeals for the Eleventh Circuit imposed the ten percent penalty on Burlington Northern, following the precedent in that circuit based on *Proctor v. Gissendaner,* 587 F.2d 182 (5th Cir. 1979). The *Proctor* decision, in the Fifth Circuit, became binding on the Eleventh Circuit by virtue of *Bonner v. City of Prichard,* 661 F.2d 1206, 1209 (11th Cir. 1981), which declared that all Fifth Circuit cases decided before October 1, 1981, were to be treated as precedent in the newly created Eleventh Circuit. Although subsequent decisions have questioned the validity of the *Proctor* holding, the court has felt bound to honor the precedent. *King v. Ford Motor Co.,* 604 F.2d 317, 318 (5th Cir. 1979) (Hill, C. J., specially concurring).

Subsequent to the division of the old Fifth Circuit into the Fifth and Eleventh Circuits, the new Fifth Circuit reconsidered *Proctor* and a later case that applied a similar Mississippi

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[14] Although this Court permitted the application of a similar Kentucky statute in a case arising in Kentucky state court seventy years ago (*Louisville & Nashville Railroad Co. v. Stewart,* 241 U.S. 261 (1916)), that decision should not be dispositive in the case at bar. In the first place, the Court's decision simply stated that the penalty may be assessed. There was no indication, either in the decision or in the abstracts of counsels' briefs (as they appear in Lawyers' Edition of United States Supreme Court Reports), that the question of the constitutionality of the statute was ever raised. *Id.,* 60 L.Ed. at 990-94. If an issue is not raised by counsel, the Court generally will not, *sua sponte,* address it, and it will not be conclusively resolved by the Court's holding. *Arizona Governing Committee v. Norris,* 463 U.S. 1073, 1087 n.17 (1983); *Bill Johnson's Restaurants, Inc. v. N.L.R.B.,* 461 U.S. 731, 737 n.4 (1983). It appears, rather, that the Kentucky statute was attacked only on the grounds that the provisions of the Federal Employer's Liability Act superseded it. Nowhere in the case is there any holding, or even dictum, that the statute comported with the Fourteenth Amendment requisites.

statute, *Walters v. Inexco Oil Co.*, 725 F.2d 1014 (5th Cir. 1984), and with the unanimous concurrence of "not only all members of the panels in those two cases but also [of] all judges in active service who were not members of those two panels," the Fifth Circuit overruled *Proctor* and *Inexco*. *Affholder, Inc. v. Southern Rock, Inc.*, 746 F.2d 305, 311 (5th Cir. 1984). The *Affholder* court noted that, "In neither [earlier] case did counsel direct the court's attention to, nor did either panel consider, the possible application of the Federal Rules Enabling Act, or the effect of the Supreme Court's decision in *Hanna v. Plumer.*" *Affholder, Inc. v. Southern Rock, Inc.*, 746 F.2d at 307.

The *Affholder* decision in the Fifth Circuit comported with the holding in the Sixth Circuit, refusing to assess in federal court a similar penalty required by a Kentucky statute. *Nordmeyer v. Sanzone*, 315 F.2d 780 (6th Cir. 1963). It was also consistent with the holding in the (old) Fifth Circuit that refused to employ the Alabama Affirmance Penalty in Alabama cases heard in federal court because of a federal question. *Charles R. Shepherd, Inc. v. United States*, 292 F.2d 146 (5th Cir. 1961). Thus, in contradistinction to the practice in the Fifth and Sixth Circuits, and the practice in all circuits in federal question cases, the Eleventh Circuit stands alone in allowing its federal courts sitting in diversity cases to assess a state-mandated Affirmance Penalty.

A. The Federal Rules of Appellate Procedure Are Controlling and Take Precedence over State Rules in Federal Court

We find primary guidance on the appropriate standard of analysis in *Hanna v. Plumer*, 380 U.S. 460 (1965). This Court said:

> When a situation is covered by one of the Federal Rules, ...the Court has been instructed to apply the Federal

> Rule, and can refuse to do so only if the Advisory Committee, this Court, and Congress erred in their prima facie judgment that the Rule in question transgresses neither the terms of the Enabling Act nor constitutional restrictions.

Id. at 471.

The *Hanna* rule was confirmed and reiterated in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980):

> The Court explained that where the Federal Rule was clearly applicable...the test was whether the Rule was within the scope of the Rules Enabling Act...and if so, within a constitutional grant of power such as the Necessary and Proper Clause of Art. I.

Id. at 748.

Hanna v. Plumer involved the applicability of the Federal Rules of Civil Procedure, while appellate procedure is at issue here. Nevertheless, both the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure are based on the same Enabling Act, 28 U.S.C. §2072 (1982), and both went through the same process before promulgation.[15] We see no reason why the *Hanna v. Plumer* analysis should be inapplicable here.

We submit that the "situation is covered" by the Federal Rules of Appellate Procedure and that the Federal Rules comply with the scope and constitutional mandate of the Rules Enabling Act.

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[15] The Rules Enabling Act, 28 U.S.C. § 2072 (1982), provides that "All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect." The Notes of the Advisory Committee following Rule 1 explain that the Rules of Appellate Procedure were also drawn under the authority of three other statutes: 28 U.S.C. § 2075 (bankruptcy rules), 18 U.S.C. § 3771 (procedure to and including criminal verdict), and 18 U.S.C. § 3772 (procedure after criminal verdict). Only 28 U.S.C. § 2072 is relevant here, since it is the only one that relates to civil suits.

1. The Federal Rules of Appellate Procedure are applicable

Three rules authorize the court to assess additional amounts against a losing appellant if certain criteria are met. Under Rule 37, if applicable law permits, the court can assess interest on the amount of the judgment affirmed. Under Rule 38, if the court finds that the appeal was frivolous, extra damages and single or double costs can be imposed. Under Rule 39, costs of the appeal can be allocated. These are the only provisions in the Rules that sanction the imposition of additional sums outside of the judgment itself, as a result of an appeal in federal court. There is simply no authority under the Rules for a federal court to add a ten percent penalty as an automatic, mandatory procedure, whenever a defendant-appellant loses an appeal.

In addition, Rule 8 spells out all the requirements, conditions, and obligations involved in obtaining a stay of execution of a money judgment upon the posting of a supersedeas bond. There is no assertion in this rule that the appellant's liability may be increased by ten percent as a consequence of complying with the terms of the rule.

A perusal of the Appellate Rules, including the four mentioned above, yields the conclusion that they are designed to be a complete and contained system of rules. Moreover, the Advisory Committee expressly said so. The Notes of the Advisory Committee on Appellate Rules, following Rule 1, provide, "The Federal Rules of Appellate Procedure were designed as an integrated set of rules to be followed in appeals to the courts of appeals, covering all steps in the appellate process . . . ."[16]

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[16] By contrast, we do not find any similar statement in the notes to the Federal Rules of Civil Procedure. We submit that this omission is no accident.

Thus, given the fact that we have specific Federal Rules of Appellate Procedure already spelling out how and under what circumstances the federal appellate court may add costs to the parties in an appeal, and the consequences of use of a supersedeas bond, the Alabama Affirmance Penalty sits directly in conflict with these Rules because it authorizes different costs on appeal and different terms for using a supersedeas bond. Ironically, in a case that is precedent for the Eleventh Circuit, the Court of Appeals held that the Alabama statute is "not . . . in accord with appellate procedure in the federal courts." *Charles R. Shepherd, Inc. v. United States,* 292 F.2d 146, 148 (5th Cir. 1961).

This Court, in *Walker,* stated that the "first question must . . . be whether the scope of the Federal Rule in fact is sufficiently broad to control the issue before the Court." *Walker v. Armco Steel Corp.,* 446 U.S. 740, 749-50 (1980). In making this determination the Court cautioned against narrowly construing federal rules "in order to avoid a 'direct collision' with state law." *Id.* at 750 n. 9. What we have here is a "direct collision" between the Federal Rules, which specify under what circumstances additional sums may be assessed and the requirements and obligations of a supersedeas bond, and the Alabama statute, which specifies different criteria for assessing additional amounts and new supersedeas obligations. If the Federal Rules are constitutionaly and statutorily valid, they must control.

Throughout the procedural history of this case, the Federal Rules have been followed. The stay of execution of the judgment upon a supersedeas bond was obtained pursuant to Rule 8, Federal Rules of Appellate Procedure. For the court then to go beyond what was authorized in the Federal Rules and to impose a penalty procedure created by state statute, outside the scope of federal procedure, was error.

2. The Federal Rules of Appellate Procedure are within the scope of the Rules Enabling Act and are constitutional

The question of whether a given rule is within the scope of the Rules Enabling Act hinges on whether "a rule really regulates procedure, — the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." *Hanna v. Plumer,* 380 U.S. 460, 464 (1965), (quoting *Sibbach v. Wilson & Co.,* 312 U.S. 1, 14 (1941)).

Here, of the four federal rules involved, Rule 37 discusses how the appellate court shall apply and enforce applicable state law, Rule 38 involves administering a remedy for disregard of the duty not to waste the court's and the appellee's time with frivolous appeals, Rule 39 procedurally divides up the costs of an appeal, and Rule 8 spells out the procedure for staying execution of an adjudged remedy. Clearly these four rules all meet the test enunciated in *Sibbach* so as to fall squarely within the ambit of the Enabling Act.

As to the constitutionality of the Rules of Appellate Procedure, in *Erie* itself, Mr. Justice Reed stated that "no one doubts" the power, under the Necessary and Proper Clause, of the federal government to prescribe procedure for federal courts. *Erie Railroad v. Tompkins,* 304 U.S. 64, 92 (1938) (Reed, J., separate opinion).

B. Even if the Federal Rules of Appellate Procedure Were not Controlling, The Alabama Affirmance Penalty Is a Procedural Provision

When there is no conflict between the Federal Rule and the state law, the policies behind *Erie v. Tompkins* control. *Hanna v. Plumer,* 380 U.S. 460 (1965); *Walker v. Armco Steel Corp.,* 446 U.S. 740 (1980). We submit that *Erie* dictates that federal

courts would not be obligated to assess the Alabama Affirmance Penalty.

We refer initially to the *Erie* holding itself. There were basically two prongs of attack on *Swift v. Tyson,* 16 Pet. 1 (1842), in Mr. Justice Brandeis' opinion. The first prong dealt with the multifarious problems of fairness which were produced by administration of justice in a federal system applying state substantive law. Mr. Chief Justice Warren later capsulated these problems into the "twin aims of the *Erie* rule; discouragement of forum shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer,* 380 U.S. 468. The second prong was the unconstitutionality of the federal common law described by Mr. Justice Brandeis as follows:

> Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts.

Erie Railroad Co. v. Tompkins, 304 U.S. 64, 78 (1938).

Hence the portion of the law which is outside the scope of the power of the federal courts to declare is relegated to the state. "The source of substantive rights enforced by a federal court under diversity jurisdiction . . . is the law of the states." *Guaranty Trust Co. v. York,* 326 U.S. 99, 112 (1945). Unfortunately, the search for a single talismanic line drawing standard has been elusive. As noted in *Hanna v. Plumer,* "choices between state and federal law are to be made not by application of any automatic 'litmus paper' criterion, but rather by reference to the policies underlying the *Erie* rule." *Id.,* 380 at 467. As a result, a variety of factors have been considered, depending on the kaleidoscopic changes in factual and legal situations presented to the Court.

Outcome Determination. Early cases following *Erie* presented fact situations wherein clearly a different result would occur

depending on whether the state or federal rule was applied. Thus in *Guaranty Trust Co. v. York* (applicable statute of limitations), *Ragan v. Merchants Transfer & Warehouse Co.* (effect of filing complaint on tolling statute of limitations) and *Woods v. Interstate Realty Co.* (foreign corporation qualification statute), the decision about whether the state law applied resulted in a complete change of results. Outcome determination provided a comfortable approach in those cases, and the state rule was deemed to be substantive.

The Alabama Affirmance Penalty easily passes this hurdle. By definition, the penalty is imposed only after the plaintiff wins at the trial and appellate levels. Thus victory would be unaffected by the unavailability of the penalty.

Rules Bound to Substantive Rights. As the fact situations developed so that the effect on who would be the prevailing party became less and less clear, the outcome determination analysis also seemed to wane in importance. In *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949), the issue was whether the federal court had to use bonding requirements set forth in a New Jersey statute authorizing derivative suit actions filed under that statute in federal court. Although the opinion of the Court followed the format of *Guaranty Trust Co. v. York,* an additional factor crept into the reasoning behind the holding that the bonding requirement was substantive:

> Rules which lawyers call procedural do not always exhaust their effect by regulating procedure. But this statute is not merely a regulation of procedure. With it or without it the main action takes the same course. However, it creates a new liability where none existed before, for it makes a stockholder who institutes a derivative action liable for the expense to which he puts the corporation and other defendants, if he does not make good his claims. Such liability is not usual and it goes beyond payment of what we know as "costs." If all the Act did was to create this liability, it

> would clearly be substantive. *But this new liability would be without meaning and value in many cases if it resulted in nothing but a judgment for expenses at or after the end of the case.* (Emphasis added.)

Id. at 555-56.

The *Cohen* opinion seemed to recognize that because the bonding requirement was inextricably tied to the liability, it was enacted by the New Jersey legislative body for a substantive purpose. The same factor was noted again in *Byrd v. Blue Ridge Rural Electric Cooperative,* 356 U.S. 525 (1958), when Mr. Justice Brennan found it to be significant that the requirement that a judge rather than a jury rule on certain aspects of an action for workmen's compensation benefits was "not a rule intended to be bound up with the definition of the rights and obligations of the parties." *Id.* at 536. Thus, the simple outcome determination test was augmented by a direct inquiry into the intent of the state legislature as to whether the rule was designed to aid the purposes of substantive law.

In this regard the Alabama Affirmance Penalty is set apart totally from any substantive law. It is included among the rules of procedure in the Code of Alabama. The statute is located in Title 12, Chapter 22 in the Code, under the headings of "Courts — Appellate Proceedings". This chapter provides, among other things, for appeal from various types of judgments (§§ 12-22-2 to 12-22-24), for bonds for security on costs of appeal and other contingencies (§§ 12-22-23 to 12-22-27), for records on appeal (§ 12-22-60) and for procedures on reversal of judgment or decree (§§ 12-22-10 to 12-22-71). It would be anomalous if the penalty which the Alabama Legislature has designated as procedural should be deemed substantive by the federal courts.

To the contrary, the supersedeas bond to which the Eleventh Circuit attached the ten percent penalty was not issued under authority of Alabama law. The supersedeas bond executed by

Burlington Northern in this case was filed under the authority of Rule 8, Federal Rules of Appellate Procedure. The federal and state bond requirements are somewhat different. The allowance of a stay and the requirement of a bond are all discretionary matters under the Federal Rule. The appellant must file a motion and show the reasons for the relief requested. The Alabama procedure would have required a bond in the amount of one hundred twenty-five percent of the judgment, and there is no discretion to deny the stay, if satisfactory bond is presented.[17] Federal Rule 8(b) contains provision for appointment of the clerk as agent for service of process with respect to liability on the bond. The bond may be enforced in the district court without the necessity of an independent action.

It is therefore evident that the Alabama Affirmance Penalty is bound to the procedure of Alabama courts, rather than to any substantive law. Thus the rights and obligations under the supersedeas bond in this case have been thoroughly defined by federal, not state, law.

Federal Policy. *Byrd v. Blue Ridge Rural Electric Cooperative* deals with an additional factor when a state rule runs against "affirmative countervailing considerations." *Id.*, 356 U.S. at 537. The issue of the availability of a jury trial brought that case "under the influence — if not the command — of the Seventh Amendment" *Id.* Mr. Justice Brennan continued:

> The policy of uniform enforcement of state-created rights and obligations, see e.g., Guaranty Trust Co. v. York (US) supra, cannot in every case exact compliance with a state rule — not bound up with rights and obligations — which disrupts the federal system of allocating functions between

---

[17] The bond set in this case by the District Court equaled $345,750, which is approximately one hundred thirteen percent of the judgment. (J.A. 23)

> judge and jury....Thus the inquiry here is whether the federal policy favoring jury decisions of disputed fact questions should yield to the state rule in the interest of furthering the objective that the litigation should not come out one way in the federal court and another way in the state court.

Id. at 537-38.

The strong federal policy in favor of jury trials was allowed to prevail over the state practice when the state rule's effect would be to disrupt or alter an essential character or function of the federal court. To the extent that policy considerations of the type discussed in *Byrd* come into play in our case, again they would seem to favor the protection of the internal consistency of the Federal Rules of Appellate Procedure. As discused in the previous section of the brief, the Federal Rules of Appellate Procedure were designed to be a comprehensive code of procedure in the appellate courts. If selective state rules relating to isolated incidents of appeal were allowed to be inserted into perceived gaps of the Rules of Appellate Procedure, the state procedural rules would of necessity alter the essential character of federal appellate practice.

Forum Shopping and Inequitable Administrative Laws. It is slightly misleading to suggest that these are factors separate and apart from the outcome determination test. Instead they constitute an outgrowth or refinement of the outcome determination analysis. If a rule is certain to determine the outcome so that a different result would obtain, then the informed litigant who was a choice will choose the forum which produces the favorable result, and forum shopping of the type which had evolved in response to the rule of *Swift v. Tyson* follows. Similarly, the same divergent result causes the equal protection problems that *Erie v. Tompkins* was designed to prevent. Nevertheless, application of outcome determination to its farthest reach would conceivably result in declaring virtually every

rule to be substantive. *Hanna v. Plumer,* 380 U.S. at 468; 19 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4508 at 117-18 (1982). For instance, if rules as to what costs may be taxed against unsuccessful parties are different in state and federal courts, then a different result accrues to the extent that the amount of recovery changes. Accordingly, there must be some means of identifying what rules are so material to the litigation that they must be declared to be substantive. In response to this need, the *Hanna* Court refined the outcome determination test as follows:

> The *Erie* rule is rooted in part in a realization that it would be unfair for the character or result of a litigation materially to differ because the suit had been brought in a federal court.
>
> > "Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. It made rights enjoyed under the unwritten 'general law' vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law." *Erie R. Co. v. Tompkins, supra,* at 74-75.
>
> The decision was also in part a reaction to the practice of "forum-shopping" which had grown up in response to the rule of *Swift v. Tyson.* 304 U.S., at 73-74. That the *York* test was an attempt to effectuate these policies is demonstrated by the fact that the opinion framed the inquiry in terms of "substantial" variations between state and federal litigation. 326 U.S., at 109. *Not only are non-substantial, or trivial, variations not likely to raise the sort*

> *of equal protection problems which troubled the Court in* Erie; *they are also unlikely to influence the choice of a forum.* The "outcome-determination" test therefore cannot be read without reference to the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws. (Emphasis added.)

Hanna v. Plumer, 380 U.S. at 467-68.

We submit that the adoption of the Alabama Affirmance Penalty by the Eleventh Circuit neither discourages forum shopping nor promotes equitable administration of laws.

The normal forum shopping concerns would include questions such as whether the case will be entertained (e.g. a statute of limitations), whether the plaintiff will prevail (e.g. the elements of a cause of action), or whether a party has the capacity to sue (e.g. a qualification statute). The Alabama Affirmance Penalty does not involve any of the issues to be tried. Most litigants are interested in winning their case at the time when they are selecting a forum. It is highly speculative to suggest that much consideration is given to an appeal at that time.

By the same token, we see no impact on the equitable administration of laws in the context of *Erie*. Mr. Justice Brandeis cataloged the problems created by *Swift v. Tyson* in terms of what amounted to totally different results based on the forum selected. *Erie Railroad Co. v. Tompkins,* 304 U.S. at 75-76. Cases were cited where contracts, tort liabilities, and property instruments were given different meanings in terms of their legal consequences. The difference between the incidents of a supersedeas bond issued in federal and in state court can hardly rise to the status of the "mischievous results" described in *Erie*.

Constitutional Power. Finally, we refer to the basis of *Erie* itself, that making substantive rules of common law is outside federal power. The constitutional authority for the Rules Enabling Act was described in *Hanna v. Plumer* as follows:

> For the constitutional provision for a federal court system (augmented by the Necessary and Proper Clause) carries with it congressional power to make rules governing the practice and pleading in those courts, which in turn includes a power to regulate matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.

Id., 380 U.S. at 472.

There should be no question that Congress and the federal courts have the constitutional power to develop rules relating to the incidents of judgments and their appeals, providing such rules comport with equal protection and due process.

Net Effect. The cumulative effect of all the factors discussed above leads to the same conclusion — that the Alabama Affirmance Penalty is a procedural rule designed for and limited to judgments in the state court. There is little basis for any conclusion that the substantive law involving primary conduct of persons subject to the jurisdiction of the State of Alabama includes the provisions of this statute.

CONCLUSION

The Federal Court of Appeals assessed Burlington Northern an additional $30,500, simply because it appealed from an adverse judgment, which was affirmed. This additional sum represented no determination of wrongfulness in pursuing an appeal, and it compensated no additional damages incurred on the part of the appellees by virtue of the appeal.

We urge that the Alabama Affirmance Penalty be declared unconstitutional, and the Order of the United States Court of Appeals for the Eleventh Circuit, granting appellee's motion for a ten percent penalty assessment based on that statute, should be vacated.

In the alternative, the Order should be vacated because the rules allocating the source of law in our federal system require that the state's procedural statute should not be injected into federal court proceedings.

Respectfully submitted,

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May 24, 1986

APPENDIX

APPENDIX

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

United States Constitution, Amendment XIV, Section 1.

* * * * *

Rules of Civil Procedure.

The Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, and the practice and procedure in proceedings for the review by the courts of appeals of decisions of the Tax Court of the United States and for the judicial review or enforcement of orders of administrative agencies, boards, commissions, and officers.

Such rules shall not abridge, enlarge or modify any substantive right and shall preserve the right of trial by jury as at common law and as declared by the Seventh Amendment to the Constitution.

Such rules shall not take effect until they have been reported to Congress by the Chief Justice at or after the beginning of a regular session thereof but not later than the first day of May, and until the expiration of ninety days after they have been thus reported.

All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect. Nothing in this title, anything therein to the contrary notwithstanding, shall in any way limit, supersede, or repeal any such rules heretofore prescribed by the Supreme Court.

28 U.S.C. § 2072 (1982).

* * * * *

Stay or Injunction Pending Appeal

(a) *Stay Must Ordinarily Be Sought in the First Instance in District Court; Motion for Stay in Court of Appeals.* Application for a stay of the judgment or order of a district court pending appeal, or for approval of a supersedeas bond, or for an order suspending, modifying, restoring or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance in the district court. . . .

(b) *Stay May be Conditioned Upon Giving of Bond; Proceedings Against Sureties.* Relief available in the court of appeals under this rule may be conditioned upon the filing of a bond or other appropriate security in the district court. . . .

Federal Rules of Appellate Procedure, Rule 8.

* * * * *

Interest on Judgments

Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment was entered in the district court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the district court, the mandate shall contain instructions with respect to allowance of interest.

Federal Rules of Appellate Procedure, Rule 37.

* * * * *

Damages for Delay.

If a court of appeals shall determine that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Federal Rules of Appellate Procedure, Rule 38.

* * * * *

Costs

(a) To Whom Allowed. Except as otherwise provided by law, if an appeal is dismissed, costs shall be taxed against the appellant unless otherwise agreed by the parties or ordered by the court; if a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered; if a judgment is reversed, costs shall be taxed against the appellee unless otherwise ordered; if a judgment is affirmed or reversed in part, or is vacated, costs shall be allowed only as ordered by the court.

(b) Costs For and Against the United States. In cases involving the United States or an agency or officer thereof, if an award of costs against the United States is authorized by law, costs shall be awarded in accordance with the provisions of subdivision (a); otherwise, costs shall not be awarded for or against the United States.

(c) Costs of Briefs, Appendices, and Copies of Records. Unless otherwise provided by local rule, the cost of printing, or otherwise producing necessary copies of briefs, appendices, and copies of records authorized by Rule 30(f) shall be taxable in the court of appeals at rates not higher than those generally charged for such work in the area where the clerk's office is located.

(d) Bill of Costs; Objections; Costs to be Inserted in Mandate or Added Later. A party who desires such costs to be taxed shall state them in an itemized and verified bill of costs which he shall file with the clerk, with proof of service, within 14 days after the entry of judgment. Objections to the bill of costs must be filed within 10 days of service on the party against whom costs are to be taxed unless the time is extended by the court. The clerk shall prepare and certify an itemized statement of costs taxed in the court of appeals for insertion in the mandate, but the issuance of the mandate shall not be delayed for taxation of costs and if the mandate has been issued before final determination of costs, the statement, or any amendment thereof, shall be added to the mandate upon request by the clerk of the court of appeals to the clerk of the district court.

(e) Costs on Appeal Taxable in the District Courts. Costs incurred in the preparation and transmission of the record, the cost of the reporter's transcript, if necessary for the determination of the appeal, the premiums paid for cost of supersedeas bonds or other bonds to preserve rights pending appeal, and the fee for filing the notice of appeal shall be taxed in the district court as costs of the appeal in favor of the party entitled to costs under this rule.

Federal Rules of Appellate Procedure, Rule 39.

* * * * *

An Act concerning Writs of Error, and for other purposes.—Passed December 18,1811

Be it enacted by the Legislative Council and House of Representatives of the Mississippi Territory, in general assembly convened, That on writs of error, if the judgment, sentence, or decree be affirmed in whole, the plaintiff in error shall pay to the defendant in error, ten per

cent. damages on the sum due, with lawful interest from the day of rendering the judgment so affirmed, besides the costs of the original suit and writ of error.

Title 39, Chapt. III, Sec. 1, Toulmin's Digest of the Laws of Alabama (1823).

* * * * *

An Act concerning Writs of Error-passed December, 1820

And be it further enacted, That whenever the judgment of a circuit court shall, on appeal or writ of error to the supreme court, be affirmed, ten per cent. damages shall be allowed, and not more: *Provided,* That no damages shall be allowed in any cause in the supreme court, unless the judgment of the court below shall have been suspended.

Title 36, Chapt. XXVI, Sec. 11, Toulmin's Digest of the Laws of Alabama (1823).

* * * * *

§ 19. In case the supreme court of errors and appeals shall affirm entirely any judgment or decree brought before them, the plaintiff in error, if he be the defendant below, shall pay to the defendant in error, ten per centum damages on the amount due with lawful interest from the time of rendering the original judgment or decree, besides the costs of the original suit and writ of error.

§ 20. Whenever the judgment of a circuit court shall, on appeal or writ of error to the supreme court, be affirmed, ten per cent. damages shall be allowed, and not more: *Provided,* That no damages shall be allowed in any cause in the supreme court, unless the judgment of the court below shall have been suspended.

Judicial Proceedings—Error and Appeals, Sections 19-20, Aikin's Digest of the Laws of Alabama (1833).

* * * * *

Affirmation of stayed judgment-generally.

When a judgment or decree is entered or rendered for money, whether debt or damages, and the same has been stayed on appeal by the execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court; and, upon the appeal of any judgment or decree entered or rendered for any amount of commissions, fees or compensation fixed or determined by the trial court and taxed or allowed as costs, if the appellate court affirms the judgment or decree of the court below and the payment thereof has been stayed on such appeal, judgment shall be entered by the appellate court against all or any of the obligors on the bond for the amount affirmed, 10 percent damages thereon and the costs of the appellate court; provided, however, that if no supersedeas bond has been executed on such appeal, the appellate court, in the event of affirmance, shall increase the amount so allowed as costs in the court below in the judgment or decree appealed from by adding thereto 10 percent damages thereon and the costs of the appellate court.

Section 12-22-72, Code of Alabama (1975).

* * * * *

Interest on money judgments and costs.

Judgments for the payment of money, other than costs, if based upon a contract action, bear interest from the day of the cause of action, at the same rate of interest as stated in said contract; all other judgments shall bear interest at the rate of 12 percent per annum, the provisions of Section 8-8-1 to the contrary notwithstanding; provided, that fees allowed a trustee, executor, administrator or attorney and

taxed as a part of the cost of the proceeding shall bear interest at a like rate from the day of entry.

Section 8-8-10, Code of Alabama (1975).

* * * * *

On any motion day, if the counsel for the defendant in error, or appellee, state that it is his belief that the case is brought into this court merely for delay, the record shall be submitted to the court without argument on either side. If the court on examining the record, consider it to be a delay case, the judgment shall be affirmed; but if it appear to be doubtful or difficult, or if when so offered to be submitted, or at any time during the term, the counsel for the plaintiff in error, or appellant, state to the court, that it is his opinion that on more full examination the judgment will be reversed or corrected, it shall not be so affirmed; or if such judgment of affirmance has been entered, it shall be set aside, and the case shall stand over for argument it [sic] its regular order.

Alabama Rules of Practice in the Supreme Court, Rule XI (1830).

* * * * *

Delay Cases

In any case set for oral hearing, if counsel for the defendant in error or appellee shall be of the opinion that the appeal was brought in this court merely for delay, he may file with the clerk his statement in writing to that effect. Copy of such statement shall be served upon counsel for plaintiff in error or appellant, who may within ten days after service of such statement upon him file with the clerk his written statement denying such fact. If no such denial is filed, the clerk shall forthwith submit the record to the court without argument on either side. If the court, on examining the

record, considers it a delay case, the judgment shall be affirmed; but if it appears to be doubtful or difficult, the court shall so state, and the case will stand for argument in its regular turn. If such denial is filed by counsel for plaintiff in error or appellant, the clerk shall in the same manner submit the record to the court, and the court may, after examining the record, either affirm the judgment, or if the case is doubtful or difficult, order the same set for oral hearing at the call of the first division next occurring, or may order that the case stand for oral hearing in its regular order on the call of the division from whence the case comes.

Alabama Revised Rules of Practice in the Supreme Court, Rule 17 (1958).

* * * * *

Damages for Frivolous Appeal.

In civil cases, if the appellate court shall determine on motion or ex mero motu that an appeal is frivolous, it may award just damages and single or double costs to the appellee.

Alabama Rules of Appellate Procedure, Rule 38.

* * * * *

Stay or Injunction Pending Appeal.

(a) *Stay by Supersedeas Bond.* The appellant shall not be entitled to a stay of execution of the judgment pending appeal (except as provided in Title 7, § 799, Code, and ARCP Rule 62(e)) unless he executes bond with good and sufficient sureties, approved by the clerk of the trial court, payable to appellee (or to the clerk or register if the trial court so directs), with condition, failing the appeal, to satisfy such judgment as the appellate court may render, when the judgment is:

> (1) For the payment of money only, in an amount equal to 150% of the amount of the judgment if the judgment does not exceed $10,000.00; or 125% if the judgment exceeds $10,000.00; . . .

Alabama Rules of Appellate Procedure, Rule 8.

* * * * *

Interest on Judgments

> Unless otherwise provided by law, if a judgment for money in a civil case is affirmed or the appeal is dismissed, whatever interest is provided by law shall be payable from the date the judgment was entered in the trial court. If a judgment is modified or reversed with a direction that a judgment for money be entered in the trial court, the certificate of judgment shall contain instructions with respect to allowance of interest.

Alabama Rules of Appellate Procedure, Rule 37.

Supreme Court, U.S.
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No. 85-1088

IN THE

Supreme Court Of The United States

October Term, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner/Appellant,

v.

ALAN WOODS AND CARA WOODS,
Respondents/Appellees.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF APPELLEES

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QUESTIONS PRESENTED

The Appellant has stated the questions:

I. WHETHER ALABAMA CODE SECTION 12-22-72 (1975), WHICH IMPOSES A MANDATORY PENALTY OF TEN PERCENT OF THE AMOUNT OF JUDGMENT ON AN UNSUCCESSFUL DEFENDANT-APPELLANT, WHILE IMPOSING NO SIMILAR PENALTY ON PLAINTIFF-APPELLANTS, IS UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES OF THE FOURTEENTH AMENDMENT.

II. WHETHER THE STATUTORY AFFIRMANCE PENALTY IS A RULE OF PROCEDURE AND NOT APPLICABLE TO ACTIONS IN FEDERAL COURT.

We agree with this statement of the issues.

PARTIES TO THE PROCEEDING

We agree with the list of parties and affiliated or related parties as printed at page ii, Petition for Writ of Certiorari.

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No. 85-1088

IN THE

Supreme Court Of The United States

October Term, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner/Appellant,

v.

ALAN WOODS AND CARA WOODS,
Respondents/Appellees.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF APPELLEES

OPINIONS BELOW

The Opinion of the Eleventh Circuit Court of Appeals, related to the substantive issues in the case, appears at 768 F.2d 1287 (11th Cir. 1985) and is printed at Appendix D of the Petition for Writ of Certiorari. The Order of the Eleventh Circuit denying Petitioner's motions for a stay of proceedings or in the alternative for oral argument is printed at Appendix M of the Joint Appendix. (J.A. 39) The Order of the Eleventh Circuit granting Respondents' motion for ten percent penalty assessment pursuant to Alabama statute is printed at Appendix A of the Petition for Writ of Certiorari. The Order of the Eleventh Circuit denying rehearing is printed at Appendix N of the Joint Appendix. (J.A. 40)

JURISDICTION

The Appellant on page 2 of its brief has correctly set forth the provisions of law concerning jurisdiction of this Court.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

The Appellant, by an Appendix, has set forth constitutional provisions, statutes and rules. By an Appendix to this brief, we have set forth additional statutes and the Consumer Price Index.

STATEMENT OF THE CASE

The Appellees accept the Appellant's Statement of the Case.

SUMMARY OF THE ARGUMENT

This Appeal challenges the constitutionality of Ala. Code Section 12-22-75 (1975). This Code section requires the assessment of a 10% affirmance fee when the payment of a money judgment has been stayed during the pendency of an unsuccessful appeal. The Appellant contends this statute is unconstitutional as being violative of the First and Fourteenth Amendments to the Constitution of the United States.

The Appellees contend the statute is constitutional. It has constituted the law of Alabama for 166 years; its constitutionality has been upheld on many occasions by the Supreme Court of Alabama; on three occasions by the Fifth Circuit Court of Appeals, and on two occasions by the Eleventh Circuit Court of Appeals. A similar Kentucky statute was held constitutional by the Supreme Court of the United States in the case of *Louisville & Nashville Railroad Co. v. Stewart,* 241 U.S. 261, 263 (1916). The correctness of this ruling has never been challenged or overruled. The statute does not violate the due process clause of the Fourteenth Amendment and it does not deny to the losing party any right to appeal. It applies only in those

cases where the payment of a judgment is stayed by the execution of a supersedeas bond. The Constitution of the United States does not require that a state provide for a stay of execution. If it does make provision for a stay, the state can attach reasonable conditions to that right. The requirements of this statute are not arbitrary because they apply to every party against whom a money judgment has been obtained regardless of race, status or financial standing.

The Appellee's second contention is that the statute should not have applicability in the federal courts because it conflicts with the Federal Rules of Appellate Procedure. This argument is untenable because the statute addresses one situation and the rules address another. Rule 38, F.R.A.P., deals with frivolous appeals or those taken for the purpose of delay. The Alabama statute applies to unsuccessful appeals when execution has been stayed. Alabama's Rule 38, A.R.A.P., is almost identical to Federal Rule 38, F.R.A.P. Alabama Rule 38 and Ala. Code Section 12-22-72 (1975) both have a field of applicability, one to frivolous appeals and the other to appeals where the plaintiff has been denied the use of the money awarded him during the pendency of the appeal.

ARGUMENT

Factual Background

The Appellee, Alan Woods, received serious injuries on August 14, 1982. He filed suit against Burlington-Northern Railroad Company in the Jefferson County Circuit Court in Bessemer, Alabama, on October 12, 1982. The defendant removed the case to the United States District Court on November 15, 1982, based on diversity of citizenship. Discovery was completed and the trial commenced January 10, 1984. The jury found the railroad 100% responsible and the plaintiff free of any negligence. The District Judge entered judgment January 13, 1984. The defendant filed a Motion for JNOV or New Trial on January 23, 1984, which was overruled on June 29, 1984. Notice of Appeal to the Eleventh Circuit Court of Ap-

peals was filed on July 24, 1984. After briefs and oral argument, the Eleventh Circuit affirmed the judgment on August 16, 1985. *Burlington Northern Railroad v. Woods,* 768 F.2d 1287 (1985). A Petition for Rehearing was filed and overruled (A-30-38).

On September 19, 1985, the Eleventh Circuit granted the Appellees' Motion to Assess 10% statutory damages provided by Ala. Code Section 12-22-72 (1975) and said, "The question is controlled by binding precedent" (A-39).

It is significant that this plaintiff was seriously injured almost four years ago, and he obtained a judgment over two years ago. This judgment went unpaid for a period of nineteen months, and he is still involved in litigation.

The plaintiff's problems were commented on by the Eleventh Circuit as follows:

> The jury could have found from the evidence that plaintiff Alan Woods sustained painful and serious injuries, that required two surgical operations, that resulted in permanent pain and disability and that will result in a permanent reduction in earnings.

I. Is The Alabama Affirmance Fee Statute (Ala. Code Section 12-22-72 (1975) Unconstitutional Under The Equal Protection and Due Process Clauses of The Fourteenth Amendment?

Alabama Code Section 12-22-72 (1975) does not violate either the equal protection or due process clauses of the Fourteenth Amendment. There are several significant aspects of this statute, namely:

(1) It does not impede an appeal by any party.

(2) It applies to any party who stays execution on a judgment rendered in cases where a money judgment has been entered against him.

(3) It only applies when the party against whom the judgment was rendered obtains a stay of execution by posting a supersedeas bond.

(4) It is only applicable when the party against whom the judgment was obtained is unsuccessful on appeal.

This statute, with minor and insignificant changes, has been the law of Alabama since 1820. The Supreme Court of Alabama has considered many times, and it has withstood every attack. It has been applied by both the Eleventh Circuit and Fifth Circuit Courts of Appeal.

Construction By The Alabama Supreme Court

The Supreme Court of Alabama first considered this statute in December, 1823, in the case of *Heart v. Judson,* Minor 135 (1823).[1] In its opinion, the Court said:

> If it were for us to consider the reason and policy of the statutes, *it would seem that an obstinate debtor who refuses to liquidate his debt, should not be benefited by his injustice;* and even in actions ex delicto, the satisfaction of the judgment should not be delayed without responsibility for damages. (Emphasis supplied)
>
> It is the unanimous opinion of the court that the judgment of the circuit court be affirmed with 10% damages.

Almost forty years later, the Supreme Court of Alabama again considered the statute in the case of *Lawrence v. Jones,* 37 Ala. 388 (1861).[2] The question presented was whether interest on the judgment should be included in computing the 10% affirmance fee. The supreme court affirmed the assessment of the 10% fee, but limited it to the judgment and not the accrued interest on the judgment. The opinion concluded:

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[1]For the convenience of the Court, a copy of *Heart v. Judson,* Minor 135 (1823), is attached as part of the Appendix.

[2]The statute has been discussed by the Alabama Supreme Court in *Weissinger and Crook, Ex Parte,* 7 Ala. 710 (1845); *City of Birmingham v. Bowen,* 254 Ala. 41, 4. So.2d 174; *Atlanta Birmingham and Coast Railroad Co. v. Cary,* 250 Ala. 675, 35 So.2d 559 (1948); *Chapman v. Rivers Construction Co.,* 284 Ala. 633, 227 So.2d 403 (1969); *McAnnally v. Levco, Inc., a corporation,* 456 So.2d 66 (1984); *Hughes v. Hughes* (First Appeal), 362 So.2d 910 (1978); *Central of Georgia Railway Co. v. Stead,* 287 Ala. 64, 248 So.2d 110 (1971).

> A statute, similar to the one under discussion, was in force in this state for 40 years. *See Clay's Digest, 309 Section 20.* We are convinced that the uniform practice of the courts has been to compute the damages only on the principal sum of the judgment. 'This having been the construction of the act for so long a time and the practice having been so universal we do not feel at liberty to disturb it'.

The railroad apparently takes the position that the affirmance fee statute's only purpose is to penalize frivolous or delay appeals. The Supreme Court of Alabama in the case of *Montgomery Light & Power Co. v. Thombs,* 204 Ala. 678, 87 So. 205 (1920), did say that the purpose was to penalize frivolous or delay appeals. The court, however, was not called upon in that case to specify all of the reasons supporting the validity of the statute. In the case of *Snellings v. Builders' Supply Co.,* 229 Ala. 1, 155 So. 858 (1934), the court declared:

> While this Court incidentally observed in *Montgomery Light & Water Power Co. v. Thombs,* 204 Ala. 678, 684, 87 So.2d 205 (1920), that Section 6153 Code was intended to penalize frivolous or delay appeals, it was not intended to assert that such was its only purpose and that the province of this Court was to determine whether an appeal was frivolous or for delay so as to authorize the statutory damages there provided when the fact stated in Section 6153 are shown by the record. The conditions are (1) a money judgment or decree; (2) that it is suspended on appeal by bond; (3) an affirmance of that judgment on appeal. The only province of this court is to determine whether those conditions exist.

In *City of Birmingham v. Bowen,* 254 Ala. 41, 47 So.2d 174 (1950), the supreme court held that even though the City was not required to file a bond to obtain a stay of execution, it was liable for the penalty. The reasoning of the court was stated as follows:

> The statute as regards Birmingham has only gone one step further and eliminated the necessity of giving any bond at all to supersede the judgment. Nevertheless, the judgment is superseded when the prescription of Section 690 is followed and in our view the real purpose of Section 814 was

> to provide *appellee litigants with the additional damages from superseded judgments when an affirmance has been ordered.* We think under authority of *City of Birmingham v. Simmons, supra,* the City of Birmingham, like all other parties defendant mentioned in 814 is subject to the penalty thereon provided for. (Emphasis supplied)

Construction By The Fifth and Eleventh Circuit Courts of Appeal

The Fifth Circuit Court of Appeals first considered and applied the Alabama affirmance fee statute in the case of *Proctor v. Gissendaner,* 587 F.2d 182 (5th Cir. 1979). Although this case was subsequently overruled by the Fifth Circuit in *Affholder v. Southern Rock,* 746 F.2d 305 (5th Cir. 1984), it was not done so on the basis of the unconstitutionality of the statute. This case will be discussed further in answer to the second contention.

The Eleventh Circuit Court of Appeals first applied Section 12-22-72 in the case of *Locke v. Allstate Ins. Co.,* 696 F.2d 1340 (11th Cir. 1983), and has consistently applied the statute ever since. In fact, the Eleventh Circuit has been requested to change its position based upon the decision of the Fifth Circuit in *Affholder, supra,* but has refused to do so. Specifically, in *Jackson v. Magnolia Brokerage Co.,* 742 F.2d 1305 (11th Cir. 1984), the Eleventh Circuit overruled an en banc application for rehearing challenging the constitutionality of the statute. The defendant did not accept the ruling of the Eleventh Circuit and filed a petition for writ of certiorari, which this Court denied at 105 S.Ct. 2704 (1985).

Precedent In The Supreme Court of The United States

The Supreme Court of the United States in the case of *Louisville & Nashville Railroad Co. v. Stewart,* 241 U.S. 261 (1916), upheld the validity of a virtually identical statute adopted by the State of Kentucky. Justice Holmes, writing for the Court in this case declared:

> The first of the other objections is that the court of appeals was not authorized to add 10 per cent damages on the amount of the judgment, as it did. But the railroad company obtained a supersedeas, and the law of the state makes 10 per cent the cost of it to all persons if the judgment is affirmed. *There was no obligation upon the state to provide for a suspension of the judgment, and nothing to prevent its making it costly in cases where ultimately the judgment is upheld. Id.* at 263 (Emphasis supplied)

Petitioner's only reference to this case is in a footnote. The Railroad says this case is not an authority because the constitutionality of the statute was not an issue. Obviously, the validity of the statute was the only issue concerning the affirmance fee. Justice Holmes answered the challenge made to the statute by saying:

> *There was no obligation upon the state to provide for a suspension of the judgment, and nothing to prevent its making it costly in cases where ultimately the judgment is upheld.* (Emphasis supplied)

Although this case was decided in 1916, the correctness of its holding has never been challenged and should control the present appeal.

The Supreme Court of Alabama followed *Louisville & Nashville R.R. Co. v. Stewart* in the case of *Atlanta, Birmingham & Coast R. R. v. Cary*, 250 Ala. 675, 35 So.2d 559 (1948). This case involved a motion to disallow the 10% affirmance fee, and the court held:

> As we view the matter, this question was settled by the Supreme Court of the United States as far back as 1916 in *Louisville & Nashville R. R. Co. v. Stewart*, 241 U.S. 261, 36 S.Ct. 586, 60 L.Ed. 989, and is conclusive in denial of the motion.

The Supreme Court of Alabama relied upon *Louisville, supra*, to uphold the validity of this statute and should be strong precedent for this Court. On the question of *stare decisis*, this Court in the case of *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1979), observed:

> We note at the outset that the doctrine of *stare decisis* weighs heavily against petitioner in this case. Petitioner seeks to have us overrule our decision in *Ragan*. *Stare decisis* does not mandate that earlier decisions be enshrined forever, of course, but it does counsel that we use caution in rejecting established law. In this case, the reasons petitioner asserts for overruling *Ragan* are the same factors which we concluded in *Hanna* did not undermine the validity of *Ragan*. A litigant who in effect asks us to reconsider not one but two prior decisions bears a heavy burden of supporting such a change in our jurisprudence. Petitioner here has not met that burden. (Id. at 749)

This statute has been part of the law of Alabama for 166 years. It is one of the oldest statutes in Alabama, and other states have similar statutes. This statute has been considered by the Alabama Supreme Court on many occasions. It has been reviewed by the Eleventh Circuit, the Fifth Circuit and a similar statute reviewed by the Supreme Court of the United States. No court, either federal or state, has held that this kind of statute violates the Fourteenth Amendment.

There Is No Constitutional Right To Stay Execution

There is no constitutional right to have a judgment superseded during the pendency of an appeal. The rule is well stated in 4A C.J.S. *Appeal & Error* Section 269 (1957) as follows:

> The right to have an appeal or a writ of error made a supersedeas is not a constitutional right, and therefore the legislature may impose the terms on which it shall be granted; the regulations concerning a stay of execution on appeal was statutory and the legislature may impose reasonable regulations as a prerequisite for a stay of proceedings.

Litigants do not have an absolute right to any appellate review. In *Lindsey v. Normet*, 405 U.S. 56, 77 (1972), this Court observed:

> This Court has held that if a full and fair trial on the merits is provided, the Due Process Clause of the Fourteenth Amendment does not require a State to provide ap-

pellate review, *Griffin v. Illinois,* 351 U.S. 12, 18, 100 L. Ed. 891, 898, 76 S.Ct. 545, 55 ALR2d 1055 (1956); *District of Columbia v. Clawans,* 300 U.S. 617, 627, 81 L.Ed. 843, 847, 57 S.Ct. 660 (1937); *Ohio v. Akron Park District,* 281 U.S. 74, 80, 74 L.Ed. 710, 715, 50 S.Ct. 228, 66 ALR 1460 (1930); *Reetz v. Michigan,* 188 U.S. 505, 508, 47 L.Ed. 563, 566, 23 S.Ct. 390 (1903); *McKane v. Durston,* 153 U.S. 684, 687-688, 38 L.Ed. 867, 868, 14 S.Ct. 913 (1894), and the continuing validity of these cases is not at issue here. When an appeal is afforded, however, it cannot be granted to some litigants and capriciously or arbitrarily denied to others without violating the Equal Protection Clause. *Griffin v. Illinois,* supra; *Smith v. Bennett,* 365 U.S. 708, 6 L.Ed.2d 39, 81 S.Ct. 895 (1961); *Lane v. Brown,* 372 U.S. 477, 9 L.Ed.2d 892, 83 S.Ct. 768 (1963); *Long v. District Court of Iowa,* 385 U.S. 192, 17 L.Ed.2d 290, 87 S.Ct. 362 (1966); *Gardner v. California,* 393 U.S. 367, 21 L.Ed.2d 601, 89 S.Ct. 580 (1969). *Cf. Coppedge v. United States,* 369 U.S. 438, 8 L.Ed.2d 21, 82 S.Ct. 917 (1962); *Ellis v. United States,* 356 U.S. 674, 2 L.Ed.2d 1060, 78 S.Ct. 974 (1958).

The New York Supreme Court in the case of *Devito v. Imbriano,* 30 A.D.2d 796, 332 N.Y.S.2d 577 (1972), considered a state statute which imposed upon an employer a penalty of 20% of the unpaid award unless the award is paid in ten days. The court upheld the validity of that statute by saying:

> It has long been established that appellants do not have a constitutional right to a stay, and that 'a stay is not a matter of right, even if irreparable injury might otherwise result to the appellant'. (*Virginian Ry. Co. v. United States,* 272 U.S. 658, 672, 47 S.Ct. 222, 228, 71 L.Ed. 463; *Matter of Schwartz [Diechmann] v. Delaware National Bank,* 39 A.D.2d 796, 332 N.Y.S.2d 206 (decided herewith)).
>
> The amendment to section 23 removing the automatic stay provision previously contained in that section is valid and constitutional.
>
> Subdivision 3 (c) of section 25 of the Workmen's Compensation Law provides that if the employer or the carrier fails to pay the award within ten days, a penalty of 20 per cent of the unpaid award shall be imposed. The purpose of the amendment to section 25 is to insure that the injured em-

> ployee will receive prompt payment of the award, and such penalty provisions have been upheld as valid. (*Matter of Hart v. Perkins*, 258 N.Y. 66, 179 N.E. 261; *Matter of Beckman v. Piels Brewery*, 28 A.D.2d 1159, 284 N.Y.S.2d 153; *Matter of Urchenko v. City of New York*, 25 A.D.2d 804, 269 N.Y.S.2d 255). Here, the assessment of the penalty was proper.

The instant case illustrates the proposition that a stay of execution is not a constitutional right. The railroad petitioned the Eleventh Circuit for a stay of execution against the collection of the affirmance fee. The petition was denied and it was only by an agreement of counsel that it was not paid while this Court considers the issues raised.

The Fifth Circuit considered a Fourteenth Amendment challenge to a Florida statute in *Empire State Ins. Co. v. Chafetz*, 302 F.2d 829 (5th Cir. 1969). This statute provided attorney's fees to a successful policyholder in a suit against his insuror. Judge Bell relied upon decisions by the Supreme Court in upholding the constitutionality of this statute and said:

> Appellant urges that this statute violates the Due Process and Equal Protection clauses of the Fourteenth Amendment, but this too has been answered adversely to appellant by the Supreme Court of the United States in *Farmers and Merchants Insurance Company v. Dobney*, 1803, 189 U.S. 301, 23 S.Ct. 565, 47 L.Ed. 821; and in *Life and Casualty Insurance Company of Tennessee v. McCray*, 1934, 291 U.S. 566, 54 S.Ct. 482, 78 L.Ed. 987 where Mr. Justice Cardoza, speaking for the court, said:
>
> > We assume in accordance with the assumption of the court below that payment was resisted in good faith and upon reasonable grounds. Even so the unsuccessful defendant must pay the adversary's costs, and costs in the discretion of the lawmaker's may include the fees of an attorney. There are systems of procedure neither arbitrary nor unenlightened, and of a stock akin to ours, in which submission to such a burden is the normal lot of the defeated litigant, whether plaintiff or defendant. The taxing master in the English courts may allow the charges of the barrister as well as the fees of the solicitor. Nothing in the Fourteenth

> Amendment forbids a like procedure here. (*Id.* at 830)

A state is not required to provide for appeal or for the stay of execution pending an appeal. If the State does afford such rights to the litigants, it can place restrictions on those rights which are rationally related to a legitimate state interest. *See City of Cleburne v. Cleburne Living Center,* 105 S.Ct. 3249, 3254 (1985) ; *Lindsey v. Normet, supra.* As the Court observed in *Cleburne,* in deciding whether there is a legitimate state interest, wide latitude is given to the state, and its action is presumed to be valid.

Alabama has an integrated judicial system applying indiscriminately to every party litigant. Before a plaintiff can file a lawsuit, in either the federal or state court, he must pay a substantial filing fee. This fee is required regardless of the merit or weakness of his case. After the case is tried, either party has the right to appeal. This appeal can be taken without superseding the payment of the judgment, and if that procedure is followed, there is no affirmance fee. If he does not want to pay the judgment or subject himself to execution, he can post a supersedeas bond and prevent the collection of the judgment pending resolution by the appellate court. If he elects to avoid payment of the judgment during the pendency of the appeal and is unsuccessful, he is subject to the 10% affirmance fee.

In considering Ala. Code Section 12-22-75, it is necessary to consider additional statutes pertaining to the stay of execution. Some cases involve title and possessory rights in property and do not result in money judgments. Alabama Code Section 12-22-73 (1975) provides:

> When an appeal is taken by the claimant on a trial of the right of property and the judgment is stayed by the execution of a supersedeas bond, if the appellate court affirms the judgment of the court below, it must also enter judgment against the obligors on said bond of 10 percent of the alternative value of the property as fixed by the trial court below.

Alabama Code Section 12-22-74 (1975) deals with supersedeas in cases involving the right to the recovery of chattels in specie. It provides for a 10% penalty when a supersedeas bond is executed, the person in possession retains possession of the property, and loses on appeal. The purpose of these three statutes is to compensate the successful party for the denial of his right to property during the pendency of an unsuccessful appeal. This is a reasonable, fair and just burden placed upon a party who has received a fair trial, but has delayed the payment of the judgment during an unsuccessful appeal.

The existence of these affirmance fee statutes promotes the prompt payment of legitimate debts and discourage useless and futile appeals and thus promote judicial economy and efficiency. That certainly is a legitimate state concern.

The affirmance fee affords the plaintiff slight compensation for being unable to collect a judgment when due. That is a matter of state concern.

A close look at Mr. Wood's situation demonstrates beyond any question that the prompt payment of judgments is a legitimate state concern. Alabama does not permit the recovery of prejudgment interest on a personal injury claim, although at least twenty-five other states do permit recovery of prejudgment interest in tort cases.[8] The federal courts have recognized

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[8]Alaska Stat. Section 09.50.270; 45.45.010 (enacted 1968); Cal. Civil Code Section 3291 (enacted 1982); Colo. Rev. Stat. Section 13-21-101 (enacted 1935); Conn. Gen. Stat. Section 37.3a (enacted 1981); Hawaii Rev. Stat. Section 636-15 (enacted 1979); Iowa Code Section 535.3 (enacted 1980); La. Rev. Stat. Ann. Section 13-4203 (enacted 1916); Me. Rev. Stat. Ann. Tit. 14 Section 1602 (enacted 1969); Md. Cts. & Jud. Proc. Code Ann. Section 11-301 (enacted 1980); Mass. Ann. Laws Ch. 231 Section 6B, supp. Section 11 (enacted 1946); Mich. Comp. Laws Section 600.6013 (enacted 1965); Nev. Rev. Stat. Section 1 (b) 1974 (enacted 1979); N.H. Rev. Stat. Ann. Section 524:1b (enacted 1957); N.J. Rev. Stat. Section 4:42-11 (b); N.Y. Estates Power & Trust Law Section 5-4.3 (enacted 1967); N.C. Gen. Stat. Section 24-5 (enacted 1981); Ohio Rev. Code Ann. Section 1343.03 (enacted 1982); Okla. Stat. Tit. 12 Section 727 (2) (enacted 1971); Pa. Con. Stat. Section 2.31 Rule 2.38 (1979); R.I. Gen. Laws Section 9.21-10 (enacted 1958); Tenn. Code Ann. Section 47-14-123 (enacted 1979); Utah Code Ann. Section 15-1-4; 7-8-27-44 (enacted 1975); Va. Code

the recoverability of prejudgment interest in cases arising under federal law.[4]

The plaintiff has paid his filing fee; has not been permitted to recover prejudgment interest; has gone through the cost of a trial and has prevailed; has successfully resisted a motion for a new trial, and now finds himself in a position where he must suffer the expense of an appeal. The plaintiff in this case is typical of many plaintiffs; he received painful and serious injuries. He underwent two surgical operations that resulted in permanent pain and disability and that will result in a permanent reduction in earnings. *See Woods* 768 at 774. He needs his money now! While he is disabled, he must still pay for housing. He must still pay utility bills. He must still pay for food for his family, and he must still pay the other normal and necessary costs of living.

The Statute Provides Compensation For a Stay of Execution and Not For Taking An Appeal

It must be remembered that the penalty is not assessed because a party appeals, but because the collection of the judgment is stayed during the pendency of an unsuccessful appeal. The railroad in this case was successful in delaying payment of the judgment for nineteen months and now contends that it

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Section 8.01-382 (enacted 1979); W. Va. Code Section 56-3-31 (enacted 1981); Wis. Stat. Section 807.01 (enacted 1980).

[4]*Rodgers v. United States*, 322 U.S. 371 (1947) (Recognition of general proposition that federal courts may exercise equitable powers to grant prejudgment interest in certain cases arising under federal law); *Bricklayers' Pension Trust Fund v. Taiariol*, 671 F.2d 988, 989 (6th Cir. 1982) (Labor-Management Relations Act of 1947 and the Employment Retirement Income Security Act of 1974); *Olsen v. Shell Oil Co.*, 708 F.2d 976 (5th Cir. 1983) (Outer Continental Shelf Lands Act); *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 592-595 (2nd Cir. 1961), cert. denied 368 U.S. 989 (1962) (Death on the High Seas Act); *Noritake Co. v. M/V Hellenic Champion*, 627 F.2d 724, 728 (5th Cir. 1980) (Death on the High Seas Act); *General Motors Corp. v. Devex Corp.*, 461 U.S. 648 (1983) (patent infringement); *National Airlines, Inc. v. Stiles*, 268 F.2d 400 (5th Cir. 1959); *Mayer v. Branniff Airways, Inc.*, 310 F.Supp. 194 (N.D. Ill. 1970).

should be permitted to do this without compensation to the plaintiff. It further contends that if it pays interest from the date of the judgment (not from the date of the injury), this is all that justice should require.

If the railroad pays nothing but interest from the date of judgment, it is paying absolutely nothing. It is true that federal and state law provide that interest be paid on a judgment from the date of its rendition until paid. However, if the defendant does not pay the judgment at the time it is rendered, it can invest the money and earn as much, and we respectfully submit in most cases much more, than the legal rate. When it finally pays the interest on the judgment, it is doing nothing more than returning to the plaintiff what was earned on the plaintiff's money while being wrongfully withheld. The defendant is actually collecting more interest than it will pay the plaintiff even if invested in Government bonds. The defendant can compound its interest income whereas the plaintiff can only recover simple interest. For this reason, we state emphatically that it pays nothing when it pays simple interest. All the defendant is required to do is deliver to the plaintiff money which it has earned by delaying payment of the judgment during the appeal.

The railroad further contends that the plaintiff gets a "windfall" by collecting the 10% penalty. What it does not state, is that the money eventually paid the plaintiff does not have the same purchasing power. It is a matter of common knowledge that inflation has steadily increased over the years at more than 5% per year, and in most years, at a much higher rate. When the judgment in this case was finally paid, the purchasing power of the $300,000 award was substantially less than on the day the judgment was entered. The plaintiff, therefore, has not received any windfall. Depending on the state of the economy, a defendant may receive a windfall from the delay even though it pays interest and the 10% affirmance fee.

We attach as part of the Appendix to this brief a copy of Table B-55 Consumer Indexes published by the Department of Labor, Bureau of Labor Statistics. This table assumes that $100

in 1967 would purchase $100 worth of goods and services. In December, 1985, it would require $327.40 to purchase the same goods and services. Had the judgment in this case been paid on the day it was entered (January 13, 1984), $305.20 would have purchased $100 worth of 1967 goods and services. When the judgment was affirmed in the Eleventh Circuit (August 16, 1985), it took $323.50 to buy the same necessities of life. The defendant has had the use of the plaintiff's money all this time. It is evident from a dollar and cents standpoint, the plaintiff has lost. The defendant has gained by having the use of the judgment money while it had a higher purchasing power. The plaintiff has been further penalized by not having the money when he may have needed it most.

No Similar Statute Has Ever Been Held Unconstitutional

The Appellant has not cited a single case in which any appellate court has ever ruled that a similar affirmance fee statute has been held unconstitutional. We have found no case so holding, although there are several states with similar statutes. *See, e.g.*, Ariz. Rev. Stat. Ann. Section 12-2106 (1956); Ga. Code Ann. Section 5-6-6 (1981); Or. Rev. Stat. Section 19.160 (1960). Mississippi and Virginia have enacted affirmance statutes which are substantially identical to the Alabama statute. Miss. Code Ann. Section 11-3-23 (1972); Va. Code Section 16.1-113 (1979).[5]

Answer To Cases Cited By Defendant

Many of the cases cited by the railroad and amicus curiae are landmark decisions on the First and Fourteenth Amendment Constitutional Rights. We see nothing in any of these cases, however, that support its contention in this case. We will

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[5]The courts of those states have found that the purpose of these statutes is to discourage frivolous appeals and to compensate holders of judgments. *See Canal Bank & Trust Co. v. Brewer*, 147 Miss. 920, 114 So. 127 (1927); *Nationwide Mut. Ins. Co. v. Tuttle*, 208 Va. 28, 155 S.E.2d 358 (1967).

comment on these cases to show their inapplicability. The case of *North Carolina v. Pearce*, 395 U.S. 711 (1969), involved the constitutional issue of whether an accused criminal, having been convicted and sentenced and successful in overturning the conviction, could, on a second conviction be given a stronger sentence than he received after the first trial. It also involved the question whether a prisoner is entitled to credit for time spent in prison prior to his conviction. We respectfully submit that this case has nothing to do with an affirmance fee. There are, however, some statements in the opinion which are favorable to the contentions that we are now making. For example, the Court in that case said:

> The result may depend upon a particular combination of infinite variables peculiar to each individual trial. It simply cannot be said that a state has invidiously 'classified' those prisoners whose convictions are not set aside by denying the members of that group the opportunity to be acquitted. To fit the problem of this case into an equal protection framework is a task too Procrustean to be rationally accomplished. We hold therefore that neither the double jeopardy provision nor the equal protection clause imposes an absolute bar to a more severe sentence upon reconviction. *Id.* at 722.

The case of *Shapiro v. Thompson*, 394 U.S. 168 (1968), involved a state regulation which denied welfare assistance to residents of the state or district who had not resided within that jurisdiction for at least one year. This Court found there was discrimination, but it was based on the following factual finding:

> There was no dispute that the effect of the waiting period requirement in each case is to create two classes of needy resident families indistinguishable from each other except that one is composed of those who have resided a year or more and the second of residents who have resided less than a year in the jurisdiction. *Id.* at 627.

The Court held that such a classification was not constitutionally permissible, but it has nothing to do, insofar as we can see, with the constitutionality of an affirmance fee.

In the case of *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974), the Court dealt with a school board rule which required a pregnant teacher to quit five months after she became pregnant.

Lindsey v. Normet, 405 U.S. 56 (1972), cited and relied upon by Appellant, when read in its entirety supports the contentions of the Appellee rather than those of the Appellant. Obviously, the Oregon statute involved in that case discriminated against tenants, and the Court so held. It then reiterated the fundamental constitutional right by saying, ". . . *if a full and fair trial on the merits is provided, the due process clause of the fourteenth amendment does not require a state to provide appellate review.*" (Emphasis supplied)

In *Griffin v. Illinois,* 351 U.S. 12 (1956), the Court dealt with the question of the right of a convicted criminal to a free transcript in order to effect his appeal. *Jimenez v. Weinberger,* 417 U.S. 628 (1974), dealt with the right of an illegitimate child to social security benefits; *Rinaldi v. Yeager,* 384 U.S. 305 (1966), involved a claim of discrimination by a prisoner who was required to pay for his transcript of testimony when other prisoners were not. *Plyler v. Doe,* 457 U.S. 202 (1982), dealt with a claim of discrimination on the part of aliens who were not permitted to enter the public school system. The issues in those cases and the other cases cited by Appellant have nothing to do with affirmance fees or orders staying the execution of judgments. The issues are so foreign to the issues involved in this case they are not apt authority.

Alabama Code Section [illegible]72 (1975) Does Not Discriminate

As we understand the contention of the Appellant, their only claim of discrimination is based on the fact that the affirmance fee applies against defendants but not against plaintiffs. The answer to that contention is quite obvious. The fee is assessed because the defendants have obtained a stay of execution. If no stay is obtained, no fee is taxed. There is nothing for the plain-

tiff to stay. If he loses, no money judgment is rendered against him and there is nothing to supersede. He is required, however, to post a cost bond to appeal and pay the costs if he is unsuccessful. He may also be required to pay damages if his appeal is held to be frivolous. Of course, if the defendant obtains a money judgment (on a counter-claim or otherwise) against the plaintiff and the plaintiff stays execution and loses, the affirmance fee would be awarded against him.

There is an incentive for a defendant to appeal. There is also an incentive for a defendant who has suffered a money judgment to supersede execution on that judgment. As long as the defendant is holding the money, it can use it. If the defendant obtains any relief on appeal, it does not have to pay the fee. And if it should be successful in reversing the case, the whole process starts over. A plaintiff has no incentive for filing a useless appeal. When the plaintiff loses, he gains nothing, but is taxed with additional costs. He, therefore, falls within an entirely different classification.

No justice of the Alabama Supreme Court has ever questioned the validity of this statute, and there have been literally hundreds of justices to sit on the court during the last 166 years. To our knowledge, there has never been a bill introduced in the State Legislature attempting to change the statute although there have been hundreds of bills passed which affect litigation. It is evident that the people of Alabama, including the bench and bar, have considered this to be a just, reasonable and fair piece of legislation.

The Supreme Court of the State of California in the case of *Trede v. Superior Court,* 21 Cal.2d 630, 134 Pa.2d 745 (1943), succinctly stated the rule by saying:

> There is no constitutional right to an appeal; the appellate procedure is entirely statutory and subject to complete legislative control. A corollary of this rule is that the legislature may impose any condition or restriction upon the granting of a stay of execution pending an appeal. *See United States v. Berg,* 202 Cal. 10, 258 P. 942; *Abelleira v.*

District Court of Appeal, 17 Cal.2d 280, 109 P.2d 942; *Foster v. Superior Court,* 115 Cal. 279, 47 P. 58.

Whether the legislature provided the best and most equitable procedure for appeal is not the issue. This Court in the case of *Williamson v. Lee Optical,* 348 U.S. 464 (1955), said:

> The law may not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction and that it might be thought that the particular legislative measure was a rational way to correct it. The day is gone when this Court uses the due process clause of the fourteenth amendment to strike down state laws, regulatory or business and industrial conditions, because they may be unwise, improvident or out of harmony with a particular school of thought. *See Nebbia v. New York,* 291 U.S. 502; *West Coast Hotel Co. v. Parrish,* 300 U.S. 379; *Olsen v. Nebraska,* 313 U.S. 236; *Lincoln Federal Labor Union, A.F.L. v. Northwestern Iron & Metal Co.,* 335 U.S. 525; *Daniel v. Family Secur. Life Ins. Co.,* 336 U.S. 220; *Day Brite Lighting, Inc. v. Missouri,* 342 U.S. 421. We emphasize again what Chief Justice Waite said in *Munn v. State of Illinois,* 94 U.S. 113, 134, 24 L.Ed. 77: 'For protection against abuses by the Legislatures that people must resort to the polls not the Courts'. *Id.* at 487-88.

We respectfully submit that the affirmance fee statute is reasonable; it serves a legitimate state purpose; it is fair and just and for the reasons hereinabove stated, it does not result in a windfall for the plaintiff. It hopefully enables him to collect his money without having to wait a long period of time, and to have it when he may need it most.

II. Alabama Code Section 12-22-72 (1975) Does Not Unlawfully Infringe Upon The Constitutional Right To Petition The Government For a Redress of Grievances

The amicus curiae brief filed on behalf of the Association of Southern California Defense Counsel contends that the affirmance fee statute is unconstitutional under the First Amend-

ment. It will be noted that this particular constitutional issue was not presented to the Eleventh Circuit when the matter was pending in that Court, and it has not been asserted as a ground for declaring the act unconstitutional by the attorneys who represent the railroad in this case. This issue will be addressed since it has been raised by the amicus curiae brief. Again, we cannot see that any of the cases cited to support this contention have any relevance to the issue in this case, although they are landmark cases on constitutional law.

This Court, in the case of *United Mine Workers of District A, District 12 v. Ill. State Bar Assoc.*, 389 U.S. 217 (1967), dealt with a fact situation in which the state bar association tried to enjoin the union from engaging in certain practices alleged to constitute the unlawful practice of law. The bar association contended that the union had hired an attorney on a salary basis to represent its members before the Illinois Industrial Commission in workmen's compensation cases. The Court held that the arrangement which the union had with its salaried lawyer was permissible. Specifically, the Court held (Justice Black):

> The decree at issue here thus substantially impairs the associational rights of the mine workers and is not needed to protect the state's interest in high standards of legal ethics. In the many years the program has been in operation there has come to light, so far as we are aware, not one single instance of abuse, of harm to clients, of any actual disadvantage to the public or to the profession, resulting from the mere fact of the financial connection between the union and the attorney who represents its members. *Id.* at 225.

In *NAACP v. Button*, 371 U.S. 415 (1966), the state of Virginia attempted to enforce a law which made it a crime to advise another that his legal rights had been infringed and referring him to a particular attorney or group of attorneys for assistance, and knowingly rendering legal assistance to the person thus referred. The Court held this did constitute an unlawful restraint upon the NAACP's freedom of expression and association. In the opinion, the Court commented upon the

fact that this was the only way that black people could protect their constitutional rights.

In *Sherbert v. Vernen*, 374 U.S. 398 (1962), the Court dealt with a case in which the plaintiff was denied unemployment compensation benefits because she was fired for not working on Saturdays. She was a Seventh Day Adventist and it was against her religious beliefs to work on Saturday. The court held, after stating what it was not holding:

> Our holding today is only that South Carolina may not constitutionally apply the eligibility provision so as to constrain a worker to abandon his religious convictions respecting the day of rest. This holding but reaffirms a principle that we announced a decade ago, namely that no state may exclude individual Catholics, Lutherans, Mohammedans, Baptist, Jews, Methodists, nonbelievers, Presbyterians, or the members of any other faith because of their faith or lack of it from receiving the benefits of public welfare legislation.
>
> In view of the results we have reached under the First and Fourteenth Amendments' guarantee of free exercise of religion, we have no occasion to consider appellant's claim that the denial of benefits also deprived her of the equal protection of the laws in violation of the Fourteenth Amendment. *Id.* at 410.

The Court in *Buckley v. Aleo*, 424 U.S. 1 (1976), dealt with a law pertaining to financial disclosure by political candidates. The opinion is almost 200 pages in length and we have found nothing in it which can be construed to support the contention of the California insurance lawyers that the Alabama statute is violative of the First Amendment.

The defense lawyers of the State of California contend that this statute deprives insurance companies of their right to seek redress in the appellate courts of Alabama. It is interesting to note that the Alabama Defense Lawyers Association has not filed a brief making this contention and the Alabama lawyers for the railroad did not make it. If defendants in Alabama felt the statute denied access to the courts, it is strange that they waited 166 years to make their feelings known to either the

Court or the Legislature. We respectfully submit there is no valid reason to abolish this Alabama law, which has been applied to all parties for such a long period of time.

III. The Alabama Affirmance Fee Statute Should Be Applicable In The Eleventh Circuit Court of Appeals In Diversity Actions Governed By Alabama Law

The railroad contends the Alabama statute conflicts with the Federal Rules of Appellate Procedure. The railroad's argument on this point is based on its interpretation of *Hanna v. Plummer*, 380 U.S. 460 (1965). This identical argument was advanced by the appellant/petitioner and rejected by the Eleventh Circuit in *Jackson v. Magnolia Brokerage Company*, 742 F.2d 1305 (11th Cir. 1984) *cert. denied*, 105 S.Ct. 2704 (1985).

In *Hanna*, and subsequently in *Walker v. Armco Steel Corporation*, 446 U.S. 740 (1980), this Court clarified the analysis which a federal court should employ when, in an action based upon the court's exercise of diversity jurisdiction, a state law is alleged to conflict with a federal rule of procedure. If the federal rule "directly conflicts" with the state law, the court must then determine whether the federal rule is within the scope of the Enabling Act, 28 U.S.C. Section 2072 (1977), and supported by a constitutional grant of federal power. *See Hanna* at 471-74; *Walker* at 749. The railroad contends, in effect, that whenever it appears that the issue in question is merely addressed by the federal rule, a *Hanna* analysis is essential. According to the railroad, *Hanna* requires almost mechanical disregard for state law on all matters which are covered by a federal rule.

We submit that a *Hanna* analysis that compels a federal court to disregard state law is dependent upon a preliminary finding of the existence of a "direct collision" or an "unavoidable collision" between the federal rule and the state law. *See Hanna* at 470, 472; *Walker* at 749. In determining the existence of a direct collision, the Court should give consideration to the ef-

fect that application of the state law would have on the federal rule. In *Hanna,* this Court dealt with a state law which in effect would have totally defeated the purpose and operation of the applicable federal rule. This Court noted:

> The Erie rule has never been invoked to *void* a Federal Rule. It is true that there have been cases where this Court had held applicable a state rule in the face of an argument that the situation was governed by one of the Federal Rules. But the holding of each such case was not that Erie commanded *displacement* of a Federal Rule by an inconsistent state rule, but that the scope of the Federal Rule was not as broad as the losing party urged, and therefore, there being no Federal Rule which covered the point in dispute, Erie commanded the enforcement of state law. *Id.* at 470, (Emphasis supplied).
>
> To hold that a Federal Rule of Civil Procedure must *cease to function* whenever it alters the mode of enforcing state-created rights would be to disembowel either the Constitution's grant of power over federal procedure or Congress's attempt to exercise that power in the Enabling Act. *Id.* at 473-74, *See also Walker* at 747-48, (Emphasis supplied).

We submit there is not a direct or unavoidable collision between Ala. Code Section 12-22-72 and the federal rules, nor does the Alabama law avoid or displace the federal rules or cause them to cease to function.[8]

The Alabama statute addresses a problem that the federal rules do not. The Alabama statute applies only if three conditions are present: (1) a money judgment is entered; (2) the judgment is stayed on appeal; and (3) the appellate court affirms the judgment. *See Snellings v. Builders' Supply Co.,* 229 Ala. 1, 155 So. 858 (1934). Federal Rules of Appellate Procedure, Rule 38, in contrast, permits the appellate court to award

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[8]It should be noted that the contrary is not true. Petitioner's position, if adopted, would completely vitiate the Alabama statute. As a result, defendants in federal courts in Alabama would be accorded significantly different and better treatment than defendants in the state courts of Alabama. This effect is offensive to the *Erie* rationale (see *Hanna* at 467) and would provide defendants with an illegitimate motive to remove cases to the federal court.

damages and costs to any party if it determines that his opponent's appeal is frivolous.

It is significant to note that the Supreme Court of Alabama has adopted a state counterpart to F.R.A.P. 38, which is A.R.A.P., Rule 38. The two rules are virtually identical. The railroad's contention that there is a direct conflict between the subject statute and the federal rule is utterly inconsistent with the fact that the Alabama Supreme Court has applied *both* the affirmance fee statute and the state frivolous appeal rule in the same case. *See McNally v. Levco, Inc.*, 456 So.2d 66, 67 (Ala. 1984). In *McNally*, a unanimous court awarded damages under Rule 38 A.R.A.P. upon a finding that the appellant had filed a frivolous appeal. It further awarded damages under Code Section 12-72-22, and said:

> Because the conditions for an award under Section 12-72-22 have been met, we hold that the 10% damages under Section 12-72-22 should be assessed against appellant. *Id.* at 67.

The Alabama affirmance fee statute is not designed to supplant the authority of an appellate court (state or federal) to impose monetary sanctions on those who prosecute frivolous appeals. The state and federal procedural rules apply to frivolous appeals, whereas the affirmance statute applies only to money judgments stayed on appeal and later affirmed. Put another way, the procedural rules cover a ground which the statute does not.

The Alabama statute does not conflict with F.R.A.P. 8. That Rule merely provides that a federal court of appeals may stay a judgment pending appeal and may condition such relief upon the filing of a bond or other security. Federal Rules Appellate Procedure Rule 8, does not purport to provide for or to prohibit the assessment of costs or damages against an appellant who has stayed execution and lost.

As Justice Harlan observed in his concurring opinion in *Hanna*, the *Erie* decision reflected more than just the Court's concerns about forum-shopping and equitable administration of the laws. *Hanna*, 380 U.S. at 474. That decision remains

"one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of power between the state and federal systems." *Id.* Alabama has not seen fit to permit the recovery of prejudgment interest on money judgments in tort cases, although, as previously stated, at least twenty-five states do have statutes or rules permitting the recovery of such interest. The Alabama Legislature could follow the trend of other states in the enactment of such a statute, but it has not done so. The Alabama affirmance fee statute compensates the injured plaintiff for the additional expenses associated with an appeal and for the loss of the use of the money retained by the defendant during the pendency of his appeal.

As the Fifth Circuit correctly concluded in *Proctor v. Gissendaner*, 587 F.2d 182, 1984 (5th Cir. 1979), for purposes of *Erie*, the Alabama statute is *substantive* — not merely procedural as the railroad contends.[7] As *Hanna* and *Walker* indicate, the *Erie* analysis is supplanted only if the state statute directly conflicts with a federal rule of procedure. If not, the state's policies, as embodied in its own statutes, must be honored by the federal court. The plaintiff is a citizen of Alabama and filed

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[7]The Fifth Circuit refused to apply a Mississippi statute that assessed a 15% penalty against a litigant who unsuccessfully appealed in *Affholder v. Southern Rock*, 746 F.2d 305 (5th Cir. 1984). In the same opinion, the Court stated the Fifth Circuit would no longer apply *Proctor, supra*. The rationale for this change in position was that F.R.A.P., Rule 38 superseded the Mississippi statute. In *Proctor*, the Fifth Circuit held that the Alabama statute created a substantive right and said:

> In diversity cases, federal courts are Erie-bound to apply the substantive law of the forum state. *Erie v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Here there can be no doubt that we are dealing with an Alabama-created non-federal substantive matter. Accordingly, this court is bound to apply Alabama law.

Regardless of the reason that might be assigned to support this holding, the end result is to deny a plaintiff a right which the same circuit held to be substantive in *Proctor, supra*. This because the federal rules simply do not provide for an affirmance fee. The Eleventh Circuit correctly refused to follow this holding of the Fifth Circuit. *See Jackson, supra*.

We respectfully submit that the Fifth Circuit was correct in *Proctor* and incorrect in *Affholder*. The Alabama statute applies to one set of circumstances and Rule 38 applies to an entirely different problem.

his suit in the state court. The railroad should not be permitted to deprive him of his substantive right to recover certain damages by removing the case to the federal court.

CONCLUSION

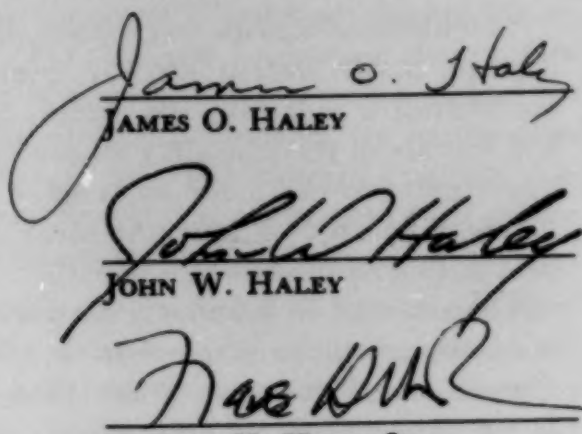
The Eleventh Circuit was correct when it awarded the 10% damages under Section 12-22-72, over nineteen months after the plaintiff's judgment was due to be paid. The defendant had the use of the plaintiff's money during that time and the opportunity to use it for its benefit. It is facetious to argue that he is not injured when the payment of his judgment is not paid during an unsuccessful appeal.

The award of an affirmance fee pursuant to this state statute is no different in principle than an award of pre or post judgment interest. Neither is it any different in principle than an award of a penalty for not paying a workmen's compensation award when it is due or an award of an attorneys' fee against an insurance company for unsuccessfully litigating a claim by a policyholder. The same would be true with respect to the provisions of the Truth & Lending Act which provides for attorneys' fees in suits brought under that act by borrowers. The wisdom of such provisions historically has been left to the legislative bodies.

The plaintiff's action was originally filed in State court and it would indeed be unjust if the defendant could profit by removing this case to federal court to deny the plaintiff's right to recover damages provided under Alabama Law. Such a ruling would discriminate against the individual citizen and afford an incentive for forum shopping by the defendant and give to the foreign defendant an advantage which a local individual or corporation would not enjoy.

This Court should affirm the judgment of the Eleventh Circuit awarding to the plaintiff the 10% damages as provided by Alabama Law.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the above and foregoing upon all attorneys of record by placing a copy of same in the U.S. mail, postage prepaid, on this the 23rd day of June, 1986, and addressed to the following:

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APPENDICES

§ 12-22-72. Affirmation of stayed judgment — Generally.

When a judgment or decree is entered or rendered for money, whether debt or damages, and the same has been stayed on appeal by the execution of bond, with surety, if the appellate court affirms the judgment of the court below, it must also enter judgment against all or any of the obligors on the bond for the amount of the affirmed judgment, 10 percent damages thereon and the costs of the appellate court; and, upon the appeal of any judgment or decree entered or rendered for any amount of commissions, fees or compensation fixed or determined by the trial court and taxed or allowed as costs, if the appellate court affirms the judgment or decree of the court below and the payment thereof has been stayed on such appeal, judgment shall be entered by the appellate court against all or any of the obligors on the bond for the amount affirmed, 10 percent damages thereon and the costs of the appellate court; provided, however, that if no supersedeas bond has been executed on such appeal, the appellate court, in the event of affirmance, shall increase the amount so allowed as costs by the court below in the judgment or decree appealed from by adding thereto 10 percent damages thereon and the costs of the appellate court. (Code 1852, §§ 3032, 3033; Code 1867, §§ 3500, 3501; Code 1876, §§ 3941, 3942; Code 1886, §§ 3661, 3662; Code 1896, § 478; Code 1907, § 2893; Code 1923, § 6153; Code 1940, T. 7, § 814; Acts 1951, No. 724, p. 1275.)

§ 12-22-73. Same — Right of property.

When an appeal is taken by the claimant on a trial of the right of property and the judgment is stayed by the execution of a supersedeas bond, if the appellate court affirms the judgment of the court below, it must also enter judgment against the obligors in said bond of 10 percent of the alternative value of the property as fixed by the trial court below. (Code 1852, § 3024; Code 1867, § 3494; Code 1876, § 3935; Code 1886, § 3663; Code 1896, § 479; Code 1907, § 2894; Code 1923, § 6154; Code 1940, T. 7, § 815.)

§ 12-22-74. Same — Recovery of chattels in specie.

Upon the affirmance of a judgment for the recovery of chattels in specie, judgment for which has been stayed by the execution of a supersedeas bond, the court must also enter judgment against the obligors in said bond for 10 percent of the alternative value of such property as fixed by the court below, and the damages fixed for the detention thereof. (Code 1852, § 3027; Code 1867, § 3495; Code 1876, § 3936; Code 1886, § 3664; Code 1896, § 480; Code 1907, § 2895; Code 1923, § 6155; Code 1940, T. 7, § 816.)

SUPREME COURT OF ALABAMA.

HEART v. JUDSON.

(December, 1823.)

1. Writ of error issued by clerk after expiration of his term of office, quashed.
2. Ten per cent. damages to be adjudged in all cases on judgment affirmed on writ of error or appeal taken since the Act of 1820.

SAFFOLD, J. — In this case the writ of error, as issued by R. Tankersly, as clerk, bears date 1st September, 1823, after the expiration of his term of office. The defendant in error moves to quash the writ, and produces a copy of the citation issued 17th of June, 1823, showing that a writ of error had previously issued. Neither this nor the corresponding transcript of the record had been filed. He moves to quash the writ of error, and for an affirmance of the judgment. The writ of error must unquestionably be quashed. The plaintiff in error refers to the transcript of the record to show that the judgment was on an unliquidated demand, and contends, under the authority of the Statute of 1819, that no damages are recoverable. This act provides that "in all cases bottomed on a contract, note, agreement, or liquidated account, where the judgment of the Circuit Court may be affirmed, fifteen per cent. damages shall be allowed," etc. Laws Ala. 168. Admitting that this transcript is sufficiently before us to show that the action was not founded on a liquidated demand, the Act of 1820 directs that whenever the judgment of a Circuit Court shall, on appeal or writ of error, be affirmed, ten per cent. damages shall be allowed and not more, etc. Laws Ala. 483. This last act does not restrict the right to recover damages to actions founded on liquidated demands, but allows them at the rate last mentioned in all cases where the judgment of a Circuit Court may be affirmed by this court. The terms of the last statute are general, not restricted like the first, as to the description of actions; and in this respect, as well as in amount of damages, the first is clearly contravened

by the last. If it were for us to consider the reason and policy of the statutes, it would seem that an obstinate debtor who refuses to liquidate his debt, should not be benefited by his injustice; and even in actions *ex delicto*, the satisfaction of the judgment should not be delayed without responsibility for damages.

It is the unanimous opinion of the court that the judgment of the Circuit Court be affirmed, with ten per cent. damages.

TABLE B–55.—*Consumer price indexes, major expenditure classes, 1946–83*

(1967 = 100)

Year or month	All items	Food and beverages		Housing				Apparel and upkeep	Transportation	Medical care	Entertainment	Other goods and services	Energy [3]
		Total [1]	Food	Total [2]	Shelter	Fuel and other utilities [2]	Household furnishings and operation [2]						
1946	58.5		58.1	60.6				67.5	50.3	44.4			
1947	66.9		70.6	65.2				78.2	55.5	48.1			
1948	72.1		76.6	69.8				83.3	61.8	51.1			
1949	71.4		73.5	70.9				80.1	66.4	52.7			
1950	72.1		74.5	72.8				79.0	68.2	53.7			
1951	77.8		82.8	77.2				86.1	72.5	58.3			
1952	79.5		84.3	78.7				85.3	77.3	59.3			
1953	80.1		83.0	80.0	76.5	83.0	91.3	84.6	79.5	61.4			
1954	80.5		82.8	81.7	78.2	83.5	90.9	84.5	78.3	63.4			
1955	80.2		81.6	82.3	79.1	85.1	89.9	84.1	77.4	64.8			
1956	81.4		82.2	83.6	80.4	87.3	89.9	85.0	78.8	67.2			
1957	84.3		84.9	86.2	83.4	89.9	91.9	87.3	83.3	69.9			90.1
1958	86.6		88.5	87.7	85.1	91.7	92.3	87.5	86.0	73.2			93.3
1959	87.3		87.1	88.6	86.0	93.0	93.1	88.2	89.6	76.4			91.8
1960	88.7		88.0	90.2	87.8	95.9	93.8	89.6	89.6	79.1			94.2
1961	89.6		89.1	90.9	88.5	97.1	93.7	90.4	90.6	81.4			94.4
1962	90.6		89.9	91.7	89.6	97.3	93.8	90.9	92.5	83.5			94.7
1963	91.7		91.2	92.7	90.7	98.2	94.6	91.9	93.0	85.6			95.0
1964	92.9		92.4	93.8	92.2	98.4	95.0	92.7	94.3	87.3			94.8
1965	94.5		94.4	94.9	93.8	98.3	95.3	93.7	95.9	89.5			96.3
1966	97.2		99.1	97.2	96.8	98.8	97.0	96.1	97.2	93.4			97.8
1967	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
1968	104.2	103.6	103.6	104.0	104.8	101.3	103.8	105.4	103.2	106.1	105.7	105.2	101.5
1969	109.8	108.8	108.9	110.4	113.3	101.6	107.7	111.5	107.2	113.4	111.0	110.4	104.2
1970	116.3	114.7	114.9	118.2	123.6	107.6	111.5	116.1	112.7	120.6	116.7	116.8	107.0
1971	121.3	118.3	118.4	123.4	128.8	115.0	115.7	119.8	118.6	128.4	122.9	122.4	111.2
1972	125.3	123.2	123.5	128.1	134.5	120.1	118.3	122.3	119.9	132.5	126.5	127.5	114.3
1973	133.1	139.5	141.4	133.7	140.7	126.9	121.6	126.8	123.8	137.7	130.0	132.5	123.5
1974	147.7	158.7	161.7	143.8	154.4	150.2	135.3	136.2	137.7	150.5	139.8	142.0	159.7
1975	161.2	172.1	175.4	164.5	169.7	167.8	151.0	142.3	150.6	168.6	152.2	153.9	176.6
1976	170.5	177.4	180.8	174.6	179.0	182.7	160.1	147.6	165.5	184.7	159.8	162.7	189.3
1977	181.5	188.0	192.2	186.5	191.1	202.2	167.5	154.2	177.2	202.4	167.7	172.2	207.3
1978	195.4	206.3	211.4	202.8	210.4	216.0	177.7	159.6	185.5	219.4	176.6	183.3	220.4
1979	217.4	228.5	234.5	227.6	239.7	239.3	190.3	166.6	212.0	238.7	188.5	196.7	275.9
1980	246.8	248.0	254.6	263.3	281.7	278.6	205.4	178.4	249.7	265.9	205.3	214.5	361.1
1981	272.4	267.3	274.6	293.5	314.7	319.2	221.3	186.9	280.0	294.5	221.4	235.7	410.0
1982	289.1	278.2	285.7	314.7	337.0	350.8	233.2	191.8	291.5	328.7	235.8	259.9	416.1
1983	298.4	284.4	291.7	323.1	344.8	370.3	238.5	196.5	298.4	357.3	246.0	288.3	419.3
1984	311.1	295.1	302.9	336.5	361.7	387.3	242.5	200.2	311.7	379.5	255.1	307.7	423.6
1985	322.2	302.0	309.8	349.9	382.0	393.6	247.2	206.0	319.9	403.1	265.0	326.6	426.5
1984: Jan	305.2	291.6	299.4	329.2	353.2	376.0	240.4	196.4	308.0	369.5	249.9	300.5	416.7
Feb	306.6	294.2	302.1	331.0	354.0	383.0	240.4	196.2	305.8	373.2	251.5	301.5	420.2
Mar	307.3	294.3	302.2	331.5	355.5	380.1	241.2	198.8	306.9	374.5	251.7	302.1	418.1
Apr	308.8	294.5	302.3	333.2	357.8	380.9	242.3	199.2	309.6	375.7	253.8	302.8	421.3
May	309.7	293.6	301.4	334.6	358.9	385.5	242.4	198.9	312.2	376.8	253.5	303.2	426.1
June	310.7	294.3	302.0	336.2	360.2	390.0	242.3	197.4	313.1	378.0	254.5	304.4	428.5
July	311.7	295.3	303.2	338.1	362.7	393.9	241.9	196.6	312.9	380.3	255.3	306.5	428.3
Aug	313.0	296.9	304.8	339.5	364.6	395.5	242.2	200.1	312.9	381.9	256.4	307.2	427.3
Sept	314.5	296.4	304.2	341.4	366.5	397.8	244.1	204.2	313.7	383.1	257.3	314.6	429.0
Oct	315.3	296.6	304.4	341.2	367.8	392.4	244.3	205.7	315.5	385.5	258.3	315.8	426.7
Nov	315.3	296.3	304.1	340.9	368.9	387.5	244.2	205.2	316.1	387.5	259.0	316.5	421.8
Dec	315.5	297.2	305.1	341.2	370.1	386.0	244.2	203.2	315.8	388.5	260.1	316.7	418.9
1985: Jan	316.1	299.3	307.3	342.0	371.2	387.2	244.2	199.8	314.7	391.1	261.0	319.1	414.5
Feb	317.4	301.4	309.5	343.6	373.3	386.5	245.2	201.8	314.3	393.8	261.3	320.5	411.4
Mar	318.8	301.6	309.7	344.7	374.3	388.2	246.9	205.3	316.7	396.5	262.2	321.1	416.6
Apr	320.1	301.6	309.6	345.9	375.9	388.7	247.9	205.9	320.0	398.0	263.3	321.8	424.4
May	321.3	301.0	308.9	348.5	379.5	393.0	247.6	205.3	321.4	399.5	263.6	322.3	431.7
June	322.3	301.4	309.3	350.4	381.8	399.4	247.1	204.6	321.8	401.7	264.	323.0	436.8
July	322.8	301.6	309.5	351.6	383.2	399.9	246.5	202.8	321.8	404.0	265.7	325.0	437.1
Aug	323.5	301.8	309.7	352.9	385.9	398.9	247.0	205.3	320.7	406.6	265.7	326.0	433.8
Sept	324.5	302.1	309.9	353.8	386.9	400.5	247.1	209.6	319.7	408.3	266.8	333.3	432.6
Oct	325.5	302.5	309.8	354.4	389.1	395.6	248.4	211.1	320.9	410.5	268.4	334.9	427.1
Nov	326.6	303.6	311.0	355.0	391.3	392.1	248.9	211.2	323.2	413.0	269.0	335.3	425.1
Dec	327.4	305.6	313.2	355.8	392.3	393.3	248.8	209.0	324.0	414.7	268.3	336.5	426.5

[1] Includes alcoholic beverages, not shown separately.
[2] Series beginning 1967 not comparable with series for earlier years.
[3] See Tables B–56 and B–57.

NOTE.—Data beginning 1978 are for all urban consumers; earlier data are for urban wage earners and clerical workers.

Data beginning 1983 incorporate a rental equivalence measure for homeowners' costs and therefore are not directly comparable with earlier figures. See *Economic Report of the President*, February 1983 for homeownership costs as measured prior to 1983.

SOURCE: Department of Labor, Bureau of Labor Statistics.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 83-7365

ANTHONY L. JACKSON, et al.,
Plaintiffs-Appellees,

versus

MAGNOLIA BROKERAGE COMPANY, et al.,
Defendants-Appellants.

Appeal from the United States District Court
For the Northern District of Alabama

(November 21, 1984)

Before GODBOLD, Chief Judge, RONEY, Circuit Judge, and TUTTLE, Senior Circuit Judge.

O R D E R :

IT IS ORDERED that the application for 10% allowance to judgment pursuant to Title 12, Code of Alabama, Section 12-22-72 (1975) be, and the same hereby is, GRANTED.

The Fifth Circuit decided in *Proctor v. Gissendaner,* 587 F.2d 182 (5th Cir. 1979), that the Alabama statute which provides for the addition of 10% of a judgment which is stayed and unsuccessfully appealed is binding in a federal appellate court under *Erie v. Tompkins,* 304 U.S. 64, 82 L.Ed. 1188 (1938). This Court has adopted the decisions of the Court of Appeals for the Fifth Circuit rendered prior to October 1, 1981 as binding precedent of this Court, subject to overrule only by the court sitting *en banc. Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir. 1981). Accordingly, this Court is bound by *Proctor. See Locke v. Allstate Ins. Co.,* 696 F.2d 1340 (11th Cir. 1983); *King v. Ford Motor Co.,* 604 F.2d 317 (5th Cir. 1979). *See also Walters v. Inexco Oil Co.,* 725 F.2d 1014 (5th Cir. 1984); *but see Affholder v. Southern Rock,* ____ F.2d ____ (5th Cir. 1984) [No. 83-4420].

Supreme Court, U.S.
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CLERK

No. 85-1088

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

BURLINGTON NORTHERN RAILROAD COMPANY,
Petitioner,

vs.

ALAN WOODS and CARA WOODS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
For the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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PARTIES TO THE PROCEEDING

A list of parties and affiliated or related parties is printed at page ii, Petition for Writ of Certiorari.

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BURLINGTON NORTHERN RAILROAD COMPANY,
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ALAN WOODS and CARA WOODS,
Respondents.

On Writ of Certiorari to the United States Court of Appeals
For the Eleventh Circuit

REPLY BRIEF OF PETITIONER

ARGUMENT

I. INTRODUCTION

This Reply Brief will restate the issues raised in Burlington Northern's previous brief and discuss the responses, if any, which were made by the Woods.

II. THE ALABAMA AFFIRMANCE PENALTY IS UNCONSTITUTIONAL UNDER THE EQUAL PROTECTION AND DUE PROCESS CLAUSES

We note at the outset the Woods' contention that this Court should be governed by *Louisville & Nashville Railroad Co. v. Stewart,* 241 U.S. 261 (1916) which they claim "upheld the

validity of a virtually identical statute." (Respondents' Brief, p. 7). As we stated previously, the *Stewart* case was not concerned with Equal Protection or with any of the issues involved in this case. (Petitioner's Brief, p. 29 n. 14). The railroad in *Stewart* simply contended that the state court was not authorized to impose a state affirmance penalty because the substantive claim was governed by the Federal Employers' Liability Act ("FELA"). (*See* Brief of Louisville & Nashville Railroad, Plaintiff in Error, pp. 10-12).

Our construction of *Stewart* is confirmed by Justice Holmes, himself, through his citation of that case in *Dickinson v. Stiles,* 246 U.S. 631 (1918). The issue in *Dickinson* was whether an FELA judgment was subject to an attorney's lien under a Minnesota statute. The railroad employee claimed that the FELA superseded the Minnesota statute, but Justice Holmes, speaking for a unanimous Court, ruled that the state statute was applicable. Justice Holmes cited *Stewart* for the proposition that the FELA "contemplated suits in state court and accepted state procedure in advance." *Id.* at 633. He thus affirmed that *Stewart* turned on a construction of congressional intent with respect to the FELA, rather than on any constitutional principle under the Fourteenth Amendment.

It is likewise inappropriate to suggest that the Alabama Supreme Court upheld the constitutionality of the Alabama Affirmance Penalty in *Atlanta, Birmingham & Coast Railroad v. Cary,* 250 Ala. 675, 35 So. 2d 559 (1948). (*See* Respondents' Brief, p. 8). There is no mention in that opinion of either Due Process or Equal Protection issues. The court reveals the arguments made by the defendant only as follows:

> We are cited to *Ellis v. Union Pacific Railroad Co.*, 329 U.S. 649, 67 S.Ct. 598, 91 L.Ed. 572, and *Bailey v. Central Vermont Railroad Co.*, 319 U.S. 350, 63 S.Ct. 1062, 87 L.Ed. 1444, which we consider here inapplicable.

250 Ala. at 679.

Both cited cases deal solely with the question of whether state law or FELA is controlling; neither case touches upon the Fourteenth Amendment. The Alabama Supreme Court correctly concluded that those preemption issues were resolved in the *Stewart* case.[1]

On the other hand, there is strong precedential value in those cases in which this Court has invalidated penalties assessed against a limited class for exercising the right of appeal. The Fourteenth Amendment was violated

— when tenants were required to pay a one hundred percent penalty, if their appeal failed, *Lindsey v. Normet,* 405 U.S. 56 (1972)

— when railroads were required to pay attorney fees of their opponent, if they lost an appeal, *Gulf, Colorado & Santa Fe Railway Co. v. Ellis,* 165 U.S. 150 (1897)

— when indigent criminal defendants who were incarcerated were required to pay for their transcript on appeal out of income from prison industry, if their appeal was unsuccessful, *Rinaldi v. Yeager,* 384 U.S. 305 (1966).

A. Equal Protection

1. Character of the Right

The Woods do not dispute that there is a fundamental right of equal access to an established appellate system. (*See* Peti-

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[1] Due Process and Equal Protection issues were raised in *Central of Georgia Railway Co. v. Steed,* 287 Ala. 64, 248 So. 2d 110 (1971), but the Alabama Supreme Court deemed itself to be bound by the precedent of the *Stewart* case. As stated in our previous brief, the reliance on *Stewart* was misplaced. (Petitioner's Brief, p. 12 n. 3).

tioner's Brief, pp. 13-16). Instead they base their position on a contention that there is no constitutional right to a stay of execution pending appeal, citing two lower court decisions.[2]

The question in this case does not hinge on any constitutional right to a stay. State and federal rules of court indisputably establish a right to a stay without regard to the Constitution. The crux of the matter here is that, in providing statutory procedures for a stay, the state must conform to Equal Protection and Due Process principles whether or not those procedures were mandated by the Constitution.

This Court has long affirmed that Equal Protection is to be afforded to litigants engaged in the appellate process. *E.g. Lindsey v. Normet,* 405 U.S. 56 (1972); *Rinaldi v. Yeager,* 384 U.S. 305 (1966); *Griffin v. Illinois,* 351 U.S. 12 (1956). *Cf. Aetna Life Insurance Co. v. LaVoie,* 54 U.S.L.W. 4381 (U.S. April 22, 1986). The conclusion of Justice Stewart in *Rinaldi v. Yeager,* 384 U.S. at 310, that it is fundamental that the appellate process should be free from unreasoned distinctions, is founded in the nature of the judicial process. The constitutional vitality of the system of justice depends on the preservation of fairness and impartiality at all levels. For example, due process was violated when a state supreme court justice was demonstrated to have a financial stake in the outcome of a case before him, *Aetna Life Insurance Co. v. LaVoie,* 54 U.S.L.W. 4381 (U.S. April 22, 1986), when a traffic court was conducted by a mayor who assessed fines that benefited his city, *Ward v. Village of*

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[2] *Devito v. Imbriano,* 30 A.D.2d 796, 333 N.Y.S.2d 577 (N.Y. App. Div. 1972), *aff'd* 350 N.Y.S.2d 406 (1973), which is of doubtful validity in light of this Court's decision in *Lindsey v. Normet,* 405 U.S. 56 (1972), decided shortly after *Devito;* and *Empire State Insurance Co. v. Chafetz,* 302 F.2d 828 (5th Cir. 1962), which did not deal with a stay, or even appellate procedure, but instead held that a statutory requirement to award attorney's fees to a successful plaintiff was constitutional. (Respondents' Brief, pp. 10-11).

Monroeville, 409 U.S. 57 (1972), and when administrative hearings were conducted by a board of optometry composed of members who were competitors of the petitioner, *Gibson v. Berryhill,* 411 U.S. 564 (1973). Equal access to appellate courts stands on a similar constitutional footing. When the scales of justice are tipped one way or the other, the process is corrupted and the credibility of the institution is impaired.

The Woods claim that the penalty is attached to the stay rather than the appeal. (Respondents' Brief, p. 14). In analyzing the significance of this argument, it is noteworthy that there is no procedure in Alabama for the protection of defendants who pay a judgment which is ultimately reversed. If Burlington Northern had paid the Woods $305,000 and then obtained a reversal, their only assurance of repayment would be the credit worthiness of the Woods, themselves. When the sole appellate procedure for protecting the defendant's rights in the event of reversal is supersedeas, the contention that the appeal and the stay are separate matters is based more on semantics than on reality.

Finally, the Woods argue that "wide latitude" is given to the state on issues of constitutionality, citing *City of Cleburne v. Cleburne Living Center,* 53 U.S.L.W. 5022 (U.S. July 1, 1985). What they don't explain is that the wide latitude mentioned in that case is granted when "social or economic legislation is at issue," *Id.* at 5023,[3] a far cry from the fundamental issues of ap-

---

[3] The *City of Cleburne* case is also distinguishable in that it deals with the nature of the classification (mentally retarded persons, in that instance) rather than the nature of the right affected. Although the analytical frameworks of the "suspect classification" cases and the "fundamental right" cases are closely similar, there is a difference in *focus* between the two types of cases. When the issue is whether a class is suspect, the emphasis is on the position of the class in society and its tendency to be subjected to deep-seated prejudice. On the other hand, in determinations as to whether a right is fundamental, the primary inquiry is directed toward the importance of the free exercise of that right in the constitutional scheme. See *Plyler v. Doe,* 457 U.S.

pellate justice addressed by the case at bar.[4]

2. State Interest

Burlington Northern demonstrated that the two interests cited by the Alabama courts—to dissuade frivolous appeals and to provide additional damages—are insufficiently compelling to justify imposing unequal and unfair burdens on those persons required to pay the penalty. (Petitioner's Brief, pp. 16-23). The Woods avoid these stated justifications and suggest as an alternative rationale that the windfall damages can be supported on the ground that "the money eventually paid the plaintiffs does not have the same purchasing power." (Respondents' Brief, p. 15).

The Woods do not claim that the Alabama Legislature in 1820 was attempting to compensate for inflation when the Alabama Affirmance Penalty was enacted, nor do they present any state court or legislative pronouncement to support their conjecture. Moreover, they can point to nothing in the scheme of the Alabama Affirmance Penalty that approximates the impact of inflation. For instance, the penalty remains at a flat ten percent regardless of the time elapsing during the appeal period. The appeal decided within six months would provide an award on a twenty percent per annum basis; while, if the case lingers for two years, the effective annual rate is five percent.[5]

202, 216-17, nn. 14, 15 (1982). It is, therefore, not particularly useful to rely upon cases such as *City of Cleburne,* which identify whether a class is suspect, to decide whether a right is fundamental, as in the present case.

[4] The Woods similarly mis-apply *Williamson v. Lee Optical,* 348 U.S. 483 (1955) (Respondents' Brief, p. 20), since that case also deals with economic regulation.

[5] The ironic result is that the quicker the judgment is paid, the greater the penalty on a proportionate basis. Such a result would seem to punish more severely those defendants who pay their superseded judgments most promptly and reward slower payment, which encourages the evil which the Woods perceive to require a remedy.

Furthermore, the effect of inflation can be just as great on the partially modified award as on that which is totally affirmed, but the penalty is provided only when there is a complete affirmance. Finally, the judgment creditor with an unsatisfied, but unsuperseded, judgment receives no benefit from the penalty, even though inflation would have the same impact and the defendant would presumably be more culpable when no bond is provided and payment has been avoided.

The Woods overlook the fact that the twelve percent annual interest awarded on a judgment under Alabama law compensates for inflation. They contend, "When it [the defendant] finally pays the interest on the judgment, it is doing nothing more than returning to the plaintiff what was earned on the plaintiff's money while being wrongfully withheld." (Respondents' Brief, p. 15). Interest is indeed designed to return what is earned on the plaintiff's money while the case is being resolved, and that return on investment includes an accommodation for the decreased purchasing power of money.

The relation between interest and inflation was thoroughly explored in another context by this Court in *Jones & Laughlin Steel Corp. v. Pfeifer,* 462 U.S. 523 (1983). Justice Stevens pointed out:

> Price inflation—or more precisely, anticipated price inflation—certainly affects market rates of return. If a lender knows that his loan is to be repaid a year later with dollars that are less valuable than those he has advanced, he will charge an interest rate that is high enough both to compensate him for the temporary use of the loan proceeds and also to make up for their shrinkage in value.

Id. at 538-9.

The Court then explored the relationship between interest rates and inflation and concluded that a trial court should not be reversed if it adopts a discount rate on the present value of future wage loss of between one percent and three percent and

explains its choice. *Id.* at 791. The net effect of this ruling was to recognize that the portion of interest earned on the safest and best investments, in excess of one percent to three percent, may be properly attributable to compensation for anticipated inflation. Thus, an interest rate of twelve percent would carry an implicit assumption that nine percent to eleven percent interest would compensate for inflation.

The Woods unwittingly provide data which confirm the appropriateness of the conclusion that interest rates are designed to compensate for loss in purchasing power. Their brief argues that:

> Had the judgment in this case been paid on the day it was entered (January 13, 1984), $305.20 would have purchased $100 worth of 1967 goods and services. When the judgment was affirmed in the Eleventh Circuit (August 16, 1985), it took $323.50 to buy the same necessities of life.

Respondents' Brief, p. 16.

Applying these figures to the amount of the original judgment, roughly $305,000 in January 1984 would have the same purchasing power as $323,000 in August 1985. In addition, the three percent annual charge for the loss of the use of money, as recognized in *Jones & Laughlin,* during this period would add another $14,487.50. During the nineteen months' interim, however, twelve percent simple annual interest on the initial $305,000 would earn approximately $57,950, so that by the time the affirmance was entered, the award would be increased to approximately $362,950, plus costs. Not only does the award with interest keep up with the actual rate of inflation and the maximum three percent charge for loss of use of money, but the plaintiffs receive more than $25,000 extra. The imposition of an additional ten percent Affirmance Penalty, amounting to $30,500 above and beyond the post-judgment interest, cannot therefore be considered anything but a "windfall." It certainly is not needed to offset inflation.

3. Statutory Classification

Burlington Northern discussed in the previous brief the irrationality of the Alabama Affirmance Penalty from the standpoint of both underinclusiveness and overinclusiveness. (Petitioner's Brief, pp. 20-23). We asked the following question: "Is there any reason to believe that frivolous or delay appeals are the exclusive province of defendants in cases affected by the statute as opposed to plaintiffs or to defendants in other kinds of cases?" (Petitioner's Brief, p. 21). The Woods seem to answer that question affirmatively. They reason, "There is an incentive for a defendant to appeal"; on the other hand, "A plaintiff has no incentive for filing a useless appeal." (Respondents' Brief, p. 19).

It is understandable that a well-informed plaintiff may find little reason to institute a worthless appeal. The appellant must pay the cost of a transcript and costs of appeal, not to mention the investment of the human resources of the client dedicated to participation in appeal activities and the risk of legal precedent adverse to the client. However, the defendant is also subject to those deterrents, plus the cost of supersedeas bond, legal fees,[6] and a generous interest award, which the Woods assert has no deterrent effect.

If there were a significant difference in the habits of plaintiffs and defendants in taking appeals, we would expect the appellate courts to be affirming a larger number of appeals taken by defendants than by plaintiffs. Such is not the case. We have examined, as a sampling, the appeals taken in the six most recent bound volumes of Southern Reporter, Second Series. (*See* Appendix A). The results are consistent running across the state lines of the four states reported in those volumes. A greater number of appeals filed by plaintiffs were affirmed than was the

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[6] The plaintiff may have legal fees to pay also, but normally there is a contingent fee arrangement.

case for appeals by defendants in each state. Three hundred eighty-two plaintiffs lost their appeals by affirmance as opposed to only two hundred eighty-six defendants. In Alabama, seventy-three plaintiffs were losing appellants as compared with sixty-five defendants.

Another way to test the validity of the Woods' assumption is to examine those cases in which the courts have actually found frivolous appeals to exist under Rule 38 of the Rules of Appellate Procedure. We performed a Westlaw search to identify all instances in which the Court of Appeals in the Eleventh Circuit (and the predecessor Fifth) invoked a penalty for frivolous or delay appeals. (*See* Appendix B). Of the twenty-one occasions when the penalty was invoked, a plaintiff was the offending party seventeen times. A similar search of Alabama cases revealed that plaintiffs filed three appeals found to be frivolous, and defendants filed two. (*See* Appendix C). We submit that it would be much fairer to assume that most litigants, both plaintiff and defendant, exercise the right of appeal when they believe that there is a reasonable opportunity to obtain a better result on an appeal than has occurred at trial.

B. Due Process

The Woods ignore the arguments by Burlington Northern that the Alabama Affirmance Penalty violates the Due Process Clause of the Fourteenth Amendment.

III. THE ALABAMA AFFIRMANCE PENALTY IS A RULE OF PROCEDURE AND IS NOT APPLICABLE TO ACTIONS IN FEDERAL COURT

A. Federal Rules of Appellate Procedure Are Controlling

The Alabama Affirmance Penalty should not be assessed in federal court because it is inconsistent with the Federal Rules of Appellate Procedure, which entirely govern procedural matters in federal appellate court. (Petitioner's Brief, pp. 30-32).

The Woods argue that the Alabama Affirmance Penalty neither collides with nor avoids nor displaces the Federal Rules of Appellate Procedure. They claim that the Alabama Affirmance Penalty

> addresses a problem that the federal rules do not. The Alabama statute applies only if: (1) a money judgment is entered; (2) the judgment is stayed on appeal; and (3) the appellate court affirms the judgment.

Respondents' Brief, p. 24.

The Woods overlook Rule 8 of the Federal Rules of Appellate Procedure, which authorizes a stay of money judgment pending appeal and bond protection in the event of affirmance. In addition, Rule 37 of the Federal Rules of Appellate Procedure provides for interest on an affirmed judgment.[7] Where the three factors described by the Woods in the above-quoted passage occur in federal court, the appellees receive full payment of judgment, plus interest and costs. The problem, if there is one, is indeed addressed. The Woods' difficulty is that the solution they prefer is not available.

The Woods also disregard Rule 1 of the Federal Rules of Appellate Procedure, which states, "These rules govern procedure in appeals to the United States courts of appeals from the United States District Courts . . ." To reach outside the Federal Rules of Appellate Procedure to the Code of Alabama for procedural guidance creates a clear and direct conflict.

Implicit in the Woods' argument is an assumption that there is no conflict with Rule 8 or Rule 38 unless specific words of express prohibition, such as "no affirmance penalty shall be

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[7] The method of arriving at a rate of interest, and the method of compounding interest, are set forth in 28 U.S.C. § 196(a)(b). The state law with respect to procedure for levy of execution on judgment is expressly incorporated by reference in subsection (a) of the same statute.

awarded," can be found in the federal rules. On the contrary, to allow the insertion of local procedural rules whenever the federal rule is silent, without first assessing whether the scope of the federal rule already covers the subject, would create a hodge podge, nonuniform system in the federal court, running counter to the purpose of the Federal Rules.

B. The Alabama Affirmance Penalty Is a Procedural Provision

Even if the Federal Rules of Appellate Procedure did not preempt the state statute, the Alabama Affirmance Penalty should not be used in federal court under the general principles of *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938), and its progeny. (Petitioner's Brief, pp. 34-42). The Woods comment on this argument by suggesting that defendants would be accorded significantly better treatment in federal court than in state court if the affirmance penalty were not applied in federal court. (Respondents' Brief, p. 24, n.6). Whether there is a difference in some aspect of the result is not the test of whether a rule is substantive in the *Erie* sense. In *Hanna v. Plumer,* 380 U.S. 460 (1965), it was argued that since a different party might prevail, depending on whether the state or federal rule on service of process was applied in that case, the rule should be considered a substantive one. Chief Justice Warren responded, "But in this sense *every* procedural variation is 'outcome-determinative.' " *Id.* at 468. To treat the rule as substantive, however, the variation must be so substantial that it becomes the lodestar which guides the litigant to choose a particular court. Chief Justice Warren continued. "Though choice of the federal or state rule will at this point have a marked effect upon the outcome of the litigation, the difference between the two rules would be of scant, if any, relevance to the choice of forum." *Id.* at 469. The same is true with regard to application of the Alabama Affirmance Penalty.

The Woods do, however, in another context place great emphasis on a case in which the Court has interpreted an affir-

mance penalty statute as procedural, rather than substantive. In *Louisville & Nashville Railroad Co. v. Stewart,* 241 U.S. 261 (1916), this Court held that an affirmance penalty in Kentucky was not preempted by the Federal Employers' Liability Act, because the FELA "accepted state procedure in advance." *Dickinson v. Stiles,* 246 U.S. 631, 633 (1918). Justice Holmes saw the affirmance penalty strictly as a state procedural device. a state procedural device.

CONCLUSION

The Alabama Affirmance Penalty stands as a discriminatory and punitive blight on the administration of justice in Alabama. We submit that it is due to be declared unconstitutional, or in the alternative, it should not be assessed in diversity actions in the federal courts.

Respectfully submitted,

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APPENDIX

APPENDIX A

Table of Affirmances

This Table was derived by reviewing all the reported cases in the six most recent (as of October 9, 1986) bound volumes of the Southern Reporter, Second Series (Volumes 483-488 So. 2d). The first step was the elimination of all criminal cases and all cases in which it could not be determined clearly, from the printed opinion, whether the appellant had been the plaintiff or the defendant (but not both, through cross-claims or cross-appeals) in the court below. Of the remaining cases, those in which the lower court's decision was affirmed in toto, without modification or amendment, are listed below:

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77	Florida	Kelson v. City of Pensacola	Plaintiff
102	Florida	Sonesta Beach Hotel v. Hinckley	Defendant
108	Florida	Bates v. Messerli	Defendant
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205	Louisiana	McCann v. State Farm Mutual Automobile Insurance Co.	Plaintiff
212	Louisiana	Vallier v. Oilfield Construction Co.	Plaintiff
249	Louisiana	Dawson v. New Orleans Clerks and Checkers Union	Plaintiff
254	Mississippi	Bankers Life and Casualty Co. v. Crenshaw	Defendant
318	Mississippi	Spain v. Holland	Plaintiff
348	Mississippi	Deposit Guaranty National Bank v. Roberts	Plaintiff
370	Mississippi	Ethridge v. Ethridge	Defendant
383	Alabama	Century 21 Reeves Realty, Inc. v. Mathews	Defendant
383	Alabama	Church v. Conlon-Tanner Corp.	Plaintiff
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465	Florida	City of Gainesville v. Charter Leasing Corp.	Defendant
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770	Florida	Florida Patient's Compensation Fund v. St. Paul Fire and Marine Insurance Co.	Plaintiff
796	Florida	C. H. Barco Contracting Co. v. State Department of Transportation	Plaintiff
809	Florida	Skoblow v. Ameri-Manage, Inc.	Plaintiff
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1187	Louisiana	Mark Investments, Inc. v. Motwane's America, Inc.	Defendant
1190	Louisiana	Butler v. Paciera	Defendant
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1110	Alabama	Campbell v. Jefferson Federal Savings and Loan Association	Plaintiff
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1185	Alabama	Johnson v. State	Defendant
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432	Alabama	Dubose v. Dubose	Defendant
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672	Florida	Beam v. University Hospital Building, Inc.	Plaintiff
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73	Florida	Marathon Trailerama, Inc. v. Department of Health and Rehabilitative Services	Defendant
94	Florida	Park-A-Partners v. Dade County	Plaintiff
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1327	Louisiana	Laneaux v. Theriot	Plaintiff
1331	Louisiana	Gardiner v. Commercial Union Insurance Companies	Defendant
1338	Louisiana	Tannery v. McGee	Plaintiff
1342	Mississippi	Savage v. Parrish	Plaintiff
1348	Alabama	Vaughn v. Carter	Defendant
1356	Alabama	Isom v. Bledsoe	Plaintiff
1357	Alabama	Hill v. Sherwood	Plaintiff

Totals for Volume 488:	Plaintiff as Losing Appellant:	78
	Defendant as Losing Appellant:	38
Totals for Alabama Cases in Volume:	Plaintiff as Losing Appellant:	4
	Defendant as Losing Appellant:	1
Totals for Florida Cases in Volume:	Plaintiff as Losing Appellant:	14
	Defendant as Losing Appellant:	9
Totals for Louisiana Cases in Volume:	Plaintiff as Losing Appellant:	57
	Defendant as Losing Appellant:	28
Totals for Mississippi Cases in Volume:	Plaintiff as Losing Appellant:	3
	Defendant as Losing Appellant:	0
Totals for All Cases Listed, Volumes 483-488:	Plaintiff as Losing Appellant:	382
	Defendant as Losing Appellant:	286
Totals for Alabama Cases Listed, Volumes 483-488:	Plaintiff as Losing Appellant:	73
	Defendant as Losing Appellant:	65
Totals for Florida Cases Listed, Volumes 483-488:	Plaintiff as Losing Appellant:	88
	Defendant as Losing Appellant:	61
Totals for Louisiana Cases Listed, Volumes 483-488:	Plaintiff as Losing Appellant:	200
	Defendant as Losing Appellant:	149
Totals for Mississippi Cases Listed, Volumes 483-488:	Plaintiff as Losing Appellant:	21
	Defendant as Losing Appellant:	11

APPENDIX B

Rule 38, Federal Rules of Appellate Procedure, Invoked in the Eleventh Circuit

This Table was derived from a computer search, on September 15, 1986, conducted on Westlaw, of cases in the Court of Appeals of the Eleventh and predecessor Fifth Circuits. The query searched was: 38 /5 "FEDERAL RULES OF APPELLATE PROCEDURE" F.R.A.P. "FED. R. APP. P." FED.R.APP.P. This query was designed to capture all cases in which some version of the citation for the Federal Rules of Appellate Procedure appeared within five words of the number 38. A list of thirty-one documents was produced. The cases retrieved were read, to find those in which appellee's motion for invocation of Rule 38 Fed.R.App.P. was granted. The following cases were identified in which Rule 38 was invoked:

	Appellant
Stubbs v. Commissioner of Internal Revenue, 797 F.2d 936 (11th Cir. 1986)	Plaintiff
King v. United States, 789 F.2d 883 (11th Cir. 1986)	Plaintiff
Pollard v. Commissioner of Internal Revenue, 786 F.2d 1063 (11th Cir. 1986)	Plaintiff
Rush v. Macy's New York, Inc., 775 F.2d 1554 (11th Cir. 1985)	Plaintiff
Fortney v. United States, 774 F.2d 445 (11th Cir. 1985)	Plaintiff
Ricket v. United States, 773 F.2d 1214 (11th Cir. 1985)	Plaintiff
Bierman v. Commissioner of Internal Revenue, 769 F.2d 707 (11th Cir. 1985)	Defendant

	Appellant
Waters v. Commissioner of Internal Revenue, 764 F.2d 1389 (11th Cir. 1985)	Plaintiff
Collins v. Amoco Production Co., 706 F.2d 1114 (11th Cir. 1983)	Plaintiff
Allstate Insurance Co. v. International Shipping Corp., 703 F.2d 497 (11th Cir. 1983)	Plaintiff
National Service Industries, Inc. v. Vafla Corp., 694 F.2d 246 (11th Cir. 1982)	Defendant
In re Grand Jury Proceedings, 652 F.2d 413 (5th Cir. 1981)	Plaintiff
Cummings v. United States, 648 F.2d 289 (5th Cir. 1981)	Plaintiff
A. L. McAlister Trucking v. BHY Trucking, Inc., 642 F.2d 1000 (5th Cir. 1981)	Defendant
Burke v. Miller, 639 F.2d 306 (5th Cir. 1981)	Plaintiff
Watson v. Callon Petroleum Co., 632 F.2d 646 (5th Cir. 1980)	Defendant
Harris v. Plastics Manufacturing Co., 617 F.2d 438 (5th Cir. 1980)	Plaintiff
Church of Scientology of California v. McLean, 615 F.2d 691 (5th Cir. 1980)	Plaintiff
Exhibitors Poster Exchange, Inc. v. National Screen Service Corp., 543 F.2d 1106 (5th Cir. 1976)	Plaintiff
Monroe Auto Equipment Co. v. N.L.R.B., 511 F.2d 611 (5th Cir. 1975)	Plaintiff
Kinnear-Weed Corp. v. Humble Oil & Refining Co., 441 F.2d 631 (5th Cir. 1971)	Plaintiff

Totals: Plaintiff as Frivolous Appellant: 17
Defendant as Frivolous Appellant: 4

APPENDIX C

Rule 38, Alabama Rules of Appellate Procedure, Invoked

This Table was derived from a computer search, on September 15, 1986, conducted on Westlaw, of cases from the Alabama state court system. The query searched was: 38 /5 "ALABAMA RULES OF APPELLATE PROCEDURE" A.R.A.P. "ALA. R. APP. P." ALA.R.APP.P. This query was designed to capture all cases in which some version of the citation for the Alabama Rules of Appellate Procedure appeared within five words of the number 38. A list of thirty-seven documents was produced. The cases retrieved were read, to find those in which appellee's motion for invocation of Rule 38 Ala.R.App.P. was granted. The following cases were identified in which Rule 38 was invoked:

	Appellant
McAnnally v. Levco, Inc., 456 So. 2d 66 (Ala. 1984)	Defendant
RMP, Inc. v. Arledge, 417 So. 2d 158 (Ala. 1982)	Plaintiff
Millican v. Cantrell, 378 So. 2d 737 (Ala. 1979)	Defendant
Hutson v. Hutson, 351 So. 2d 588 (Ala. Ct. Civ. App. 1977)	Plaintiff
Boone v. Director of the Department of Public Safety, 337 So. 2d 6 (Ala. 1976)	Plaintiff

Totals: Plaintiff as Frivolous Appellant: 3
Defendant as Frivolous Appellant: 2

Supreme Court, U.S.
FILED
MAY 8 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 85-1088

IN THE
SUPREME COURT
OF THE UNITED STATES
October Term, 1985

BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

vs.

ALAN WOODS AND CARA WOODS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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NO. 85-1088

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ALAN WOODS AND CARA WOODS,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

BRIEF OF ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL AS AMICUS CURIAE IN SUPPORT OF PETITIONER

With consent of the parties, the Association of Southern California Defense Counsel respectfully submits this brief as amicus curiae in support of Petitioner.

INTEREST OF AMICUS CURIAE

Amicus curiae, the Association of Southern California Defense Counsel, represents approximately 1800 attorneys in Southern California who regularly represent the interests of defendants in tort litigation, usually at the request of the defendant's insurer. Its members are vitally interested in the question whether a state may constitutionally impose a penalty against a judgment debtor for pursuing an appeal where, regardless of the substantiality of the issues raised on appeal and the defendant's good faith, imposition of the penalty follows automatically if the appeal is lost.

In the present case, the constitutionality of Alabama's automatic penalty against an unsuccessful defendant-appellant has been challenged by petitioner on equal protection and due process grounds. We urge this Court to consider another significant constitutional problem, namely, the seriously chilling effect that penalty will have on the exercise of a judgment debtor's First Amendment right to petition the courts for redress of grievances by filing and prosecuting an appeal.

As attorneys who regularly represent judgment debtors, the members of amicus curiae are acutely aware of the chilling effect automatic or arbitrary sanctions, such as the one here involved, have and are likely to have on their clients' legitimate exercise of their First Amendment rights. The Alabama penalty not only adversely impacts the rights of individual defendants to seek reversal of erroneous judgments, it also inhibits the collective rights of defendants to participate fully in the judicial process and the resulting body of judge-made law it produces.

Finally we note the Alabama automatic fine is but one of a number of obstacles which, with growing frequency and

severity, are being placed in the path of litigants who legitimately wish to seek appellate review of adverse judgments. There is an urgent need for articulation and reaffirmation of the First Amendment rights of litigants to seek reasonable and legitimate redress in the courts without fear of harsh and arbitrary sanctions if they fail.

SUMMARY OF ARGUMENT

The First Amendment protects the right to petition the government for redress of grievances. (*United Mine Workers of America v. Illinois State Bar Ass'n.*, 389 U.S. 217, 222 (1967).) Free access to the courts is an important aspect of this fundamental right. By imposing an automatic ten percent penalty upon all judgment debtors who appeal and lose, section 12-22-72, Code of Alabama (1975), necessarily has a chilling effect upon that First Amendment right. There are three aspects to the problem. First, the First Amendment protects the rights of individual defendants to seek appellate review of erroneous judgments. Next, the First Amendment protects the collective right of defendants to participate fully in the appellate, common-law process by which the judiciary exercises its policy-making, law-creating function. This includes the right of defendants to select and initiate cases for appellate review. Finally, Alabama's automatic penalty operates with particular severity upon insurers, who are often under a legal duty to their insureds to seek appellate relief, yet at the same time face a variety of sanctions if they do so unsuccessfully.

Given the constitutional basis of defendant's rights, the Alabama statute can be upheld only in the event of a compelling state interest and the absence of less invasive alternatives to achieve that interest. (*Buckley v. Valeo*, 424 U.S. 1, 25 (1976).) No such interest can be shown. Further,

other more discriminating and far less drastic measures are available to discourage the filing of meritless appeals. (See *Sherbert v. Verner*, 374 U.S. 398, 407 (1963) ["[E]ven if the possibility of spurious claims did threaten to dilute the fund and disrupt the scheduling of work, it would plainly be incumbent upon the appellees to demonstrate that no alternative forms of regulation would combat such abuses without infringing First Amendment rights"].) At the very least, the First Amendment requires that a distinction be drawn between legitimate and frivolous appeals and that adequate criteria be required to distinguish between them. The Alabama statute does neither.

ARGUMENT

I.

SECTION 12-22-72, CODE OF ALABAMA, IMPERMISSIBLY IMPINGES UPON THE CONSTITUTIONAL RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES.

The right to petition the government for a redress of grievances under the First Amendment is "among the most precious of the liberties safeguarded by the Bill of Rights." (*United Mine Workers of America v. Illinois State Bar Ass'n.*, 389 U.S. 217, 222 (1967).) Free access to the courts is an important aspect of that right. (*N.A.A.C.P. v. Button*, 371 U.S. 415, 430 (1963) ["[U]nder the conditions of modern government, litigation may well be the sole practical avenue open to a minority to petition for redress of grievances"]; *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731, 744 (1983) ["The right to litigate is an important one. . . "

The First Amendment protection must be afforded if there is "any realistic chance that the [parties'] legal theory might be adopted." (*Id.*, at 747.)]; *Brotherhood of Railroad Trainmen v. Virginia*, 377 U.S. 1, 7 (1964).)

The right to petition for a redress of grievances through resort to the courts is protected by the First Amendment even where the controversy is between private parties. (*California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) ["[I]t would be destructive of rights of association and of petition to hold that groups with common interests may not, without violating the antitrust laws, use the channels and procedures of state and federal agencies and courts to advocate their causes and points of view respecting resolution of their business and economic interests vis-a-vis their competitors."]; *United Mine Workers v. Illinois State Bar Ass'n.*, 389 U.S. at 223 ["[T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political."]

Few liberties have been more zealously guarded than the right to protect one's property in a court of law. This Court has recognized that a person cannot be deprived of his property without an opportunity to defend "at a meaningful time and in a meaningful manner." (*Fuentes v. Shevin*, 407 U.S. 67, 80 (1972).)

Section 12-22-72 impinges upon the First Amendment right to petition for a redress of grievances through the courts in the most direct fashion imaginable: It imposes a ten percent penalty upon judgment debtors for their mere exercise of one significant aspect of that right, the unsuccessful pursuit of an appeal. [1] Imposition of the

---

[1] We recognize a state need not provide a system of appellate review as a matter of right in the first instance. (*McKane v. Durston*, 153 U.S.

penalty is not reserved for appeals found to be frivolous or to have been pursued in bad faith; its sanction falls equally upon judgment debtor-appellants whose unsuccessful appeals presented substantial issues and were entirely legitimate by any reasonable criteria. Indeed, *Aetna Life Insurance Co. v. Lavoie*, No. 84-1601, recently decided by this Court on April 22, 1986, provides a dramatic example of the statute's impact. Aetna appealed a judgment entered against it for $3,501,650.22. The judgment was affirmed by the Supreme Court of Alabama and the penalty amounting to $350,165.00 for pursuing the appeal was automatically assessed against Aetna. The appeal was manifestly meritorious. Aetna lost in the Alabama Supreme Court by a vote of 5-4. It prevailed in this Court by a vote of 8-0.[2]

684, 6 (1894).) However, "it is now fundamental that, once established, [appellate review] must be kept free of unreasonable distinctions that can only impede open and equal access to the courts." (*Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966).) Accord: *Evitts v. Lucey*, ___U.S.___, 53 U.S.L.W. 4101, 4105 (1985) ["[W]hen a state opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the constitution. . . ."]; *Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969); *Texaco Inc. v. Pennzoil Co.*, 784 F.2d 1133, 1154 (2nd Cir. 1986).)

[2] Under the "sham" exception to the First Amendment right to petition for a redress of grievances, there is no constitutional protection for activity designed to injure a third party rather than obtain governmental action. (See *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. at 743 ["Just as false statements are not immunized by the First Amendment right to freedom of speech . . . baseless litigation is not immunized by the First Amendment right to petition."].) The vice of section 12-22-72, however, is that it sweeps within its ambit the most meritorious appeals together with the totally frivolous. (Cf. *Bill Johnson's Restaurants, Inc. v. N.L.R.B.*, 461 U.S. 731: National Labor Relations Board may not enjoin prosecution of state court action as sham if the state plaintiff is able to present the Board with evidence that his lawsuit raises genuine issues of material fact or law. (*Id.*, at 745-746.))

Because its sanction falls indiscriminately, section 12-22-72 necessarily has a chilling effect on the prosecution of appeals by those against whom money judgments have been entered. A party subjected to a substantial money judgment must consider that, no matter how substantial and significant the issues it wishes to present to an appellate court, if it fails to persuade a majority of the justices, it will be penalized severely for its efforts. The inevitable effect is to deter a substantial number of judgment debtors with legitimate grievances from pursuing their appellate remedies.

II.

BECAUSE SECTION 12-22-72 ADVERSELY IMPACTS UPON A FUNDAMENTAL CONSTITUTIONAL RIGHT, IT CAN BE JUSTIFIED ONLY BY SHOWING A COMPELLING STATE INTEREST. NONE CAN BE SHOWN.

First Amendment rights are basic and lie at the foundation of a free society. (*Buckley v. Valeo*, 424 U.S. at 25.) Accordingly, governmental action that has the effect of curtailing those rights is subject to the strictest scrutiny and can be justified only if the state can show a compelling interest and employs means closely drawn to avoid unnecessary abridgment of First Amendment freedoms. (*Ibid; Shapiro v. Thompson*, 394 U.S. 618, 633-634 (1969).)

Section 12-22-72 cannot be justified by reference to a compelling state interest. Indeed, it is difficult to identify any "state interest" served by section 12-22-72. The Supreme Court of Alabama struggled to identify any purpose. For example, in *Snellings v. Builders' Supply Co.*, 229 Ala. 1, 155 So. 858 (1934), the court observed that, while it had previously stated section 12-22-72 was intended "to penalize frivolous or delay appeals," it had not intended in that prior case to suggest "such was its only purpose." But *Snellings* fails to suggest any other purpose that might be served by the statute.

If the purpose of the statute is to discourage frivolous appeals, that purpose can be accomplished in a far less draconian fashion by legislation more closely drawn to avoid abridgment of First Amendment rights. Indeed, rule 38, Ala.R.App.P. provides that all appellants who take frivolous appeals may be appropriately penalized after a judicial determination that the appeal was frivolous. Thus, if the purpose of section 12-22-72 is to deter frivolous appeals, it is redundant as well as overbroad.

Similarly, if its purpose is to compensate the judgment creditor for the loss of the use of its money during the pendency of the appeal, it is once again redundant and unnecessary. Rule 37, Ala.R.App.P., and section 8-8-10, Code of Alabama, provide interest is assessed at the rate of twelve percent per annum against an appellant if a money judgment is affirmed on appeal.

III.

BY DETERRING APPEALS BY JUDGMENT DEBTORS, SECTION 12-22-72 ADVERSELY AFFECTS THE APPELLATE COURTS' ABILITY TO PERFORM THEIR POLICY MAKING FUNCTION.

Until now, we have focused on the significance of access to the appellate courts from the standpoint of the individual civil defendant seeking to protect an interest in property. But the right of access to the courts also can and should be viewed from an institutional perspective. (Cf. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961) ["In the first place, such a holding (that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws) would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade. In a representative democracy such as this, these branches of government act on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives"].)

From an institutional perspective, public policy considerations militate against statutes like section 12-22-72 because they profoundly inhibit access to the appellate courts for a major class of litigants. The appellate courts provide a major forum for the exchange of views on matters of public importance and they exercise a powerful voice in shaping the law. They are a vitally important forum for the airing and resolution of issues of public policy.

> "Appellate courts serve two quite different functions: First, appellate courts review the trial record for error in the particular case. We can call this the review for correctness. Second, appellate courts use the cases before them as vehicles for stating and applying constitutional principles, for authoritatively interpreting statutes, for formulating and expressing policy on legal issues of system-wide concern, for developing the common law, and for supervising each level of the system below them. We can call the second set of tasks the institutional functions — the business of Government." (Hufstedler, *New Blocks for Old Pyramids: Reshaping the Judicial System* 44 S.Cal.L.Rev. 901, 906-907 (1971).)

Of particular significance to this case is the appellate courts' responsibility for shaping common law principles in the field of tort law.

Unlike the executive and legislative branches, the appellate courts cannot initiate action but must wait for litigants to request appellate review. As the California Supreme Court put it in *Rodriguez v. Bethlehem Steel Corp.*, 12 Cal.3d 382, 394, 525 P.2d 669, 115 Cal.Rptr. 765 (1974), appellate courts perform their important institutional functions by "adjudicating on a regular basis the *rich variety* of individual cases brought before them." (Emphasis added.) By deterring appeals by judgment debtors, section 12-22-72 necessarily limits the variety of individual cases brought before the appellate courts after judgment. In this context, the common law becomes diet-deficient, nurtured only by cases and issues presented by plaintiffs. This is particularly important in the rapidly evolving area of tort law. The appellate courts cannot perform their important

institutional function without a steady flow of appeals initiated by all sides. They should hear from defendants as regularly as they do from plaintiffs. As the California Supreme Court stated in *In re Marriage of Flaherty*, 31 Cal.3d 637, 648, 646 P.2d 179, 183 Cal.Rptr. 508 (1982): " 'Free access to the courts is an important and valuable aspect of an effective system of jurisprudence. . . .' "

IV.

THE IMPOSITION OF AN AUTOMATIC PENALTY FOR PURSUIT OF AN UNSUCCESSFUL APPEAL POSES UNIQUE PROBLEMS WHERE THE JUDGMENT DEBTOR IS DEFENDED BY A LIABILITY INSURER.

Imposition of an automatic penalty for an unsuccessful appeal poses unique problems where the judgment debtor is defended by a liability insurer. The onus of an indiscriminate fine is magnified because an insurer in many instances has a legal obligation to appeal a judgment against its insured.

Under the broad "duty to defend" clause in most liability insurance policies, an insurer "bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy." (*Gray v. Zurich Ins. Co.*, 65 Cal.2d 263, 276-277, 419 P.2d 168, 54 Cal.Rptr. 104 (1966).) The duty to defend does not end once the jury renders its verdict. Quite the contrary. An insurer's contractual duty to defend can obligate it to bring an appeal where the insurer defends through trial, the insured requests an appeal because a portion of the judgment is uninsured, and there are reasonable grounds for appeal. (E.g., *Cathay Mortuary (Wah Sang) Inc. v. United Pacific*

Ins., 582 F.Supp. 650 (N.D. Cal. 1984); *Arenson v. National Auto. & Cas. Ins. Co.*, 48 Cal.2d 528, 536, 310 P.2d 961 (1957); *Cornwell v. Safeco Ins. Co. of America*, 346 N.Y.S.2d 59, 71-72 (App.Div. 1973).)[3] "Reasonable grounds for appeal" exist whenever the issues are "debatable" and "advanced in good faith." (*Arenson v. National Auto & Cas. Co.*, 48 Cal.2d at 538.)[4]

Therefore, if (1) there is a broad duty to defend in the policy, (2) a portion of the judgment is or may be uninsured, (3) the insured desires an appeal, and (4) there are reasonable grounds for an appeal, then the insurer in many cases is *obligated by law* to bring an appeal. However, its legal duty to appeal will not save the insurer from the automatic ten percent penalty under section 12-22-72, even if all four criteria are met.

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[3] The cases on an insurer's duty to appeal are collected in: 7C Appleman, *Insurance Law and Practice*, § 4688, p. 199 (Berdal ed. 1979); 14 *Couch on Insurance 2d*, § 51:38, p. 448 (Rev. ed. 1982); Long, *The Law of Liability Insurance*, § 5.57, p. 5-437 (1983); Windt, *Insurance Claims and Disputes*, § 4.15, p. 131 (1982); Magarick, *Excess Liability*, § 11.30, p. 208 (2d ed. 1982); Annotation, *Duty of Liability Insurer to Appeal*, 69 A.L.R.2d 690 (1960); and 44 Am Jur.2d Insurance, § 1407, p. 347.

[4] Even where the entire judgment is covered by the policy, the insured may have a substantial interest that would be served by an appeal. For example, if the insured is a professional person (e.g., a doctor or lawyer), an outstanding judgment may adversely affect his or her reputation or livelihood. For this reason, policies issued to such insureds often preclude the carrier from settling without the consent of the insured and require it to prosecute an appeal on the insured's behalf. In the case of doctors and health care facilities, statutes often reinforce this policy term. (See, e.g., California Bus. & Prof. Code § 801, subd. (c); California Health & Saf. Code § 1306.)

CONCLUSION

An appeal is a classic example of a petition for a redress of grievances against the government, namely the judiciary, as the appellant must argue that it did not receive a fair and proper trial in the lower court, the governmental entity that entered judgment against it. If a nonfrivolous appeal can lead to an automatic penalty, often for hundreds of thousands of dollars, simply because it was unsuccessful, the First Amendment rights of appellants will be seriously chilled. Individual appellants, however, are not the only ones to suffer from a rule indiscriminately penalizing unsuccessful appeals by judgment debtors. The inevitable result of the rule is to limit the number and types of appeals presented to the appellate courts, thereby inhibiting and skewing their institutional, policy making function. Finally, an automatic fine impacts with particular severity upon insurers, who are often under a contractual duty to pursue an appeal on behalf of their insured.

Accordingly, the ten percent damage provision of section 12-22-72, Code of Alabama should be declared unconstitutional as in violation of the First Amendment right to petition the government for a redress of grievances.

Respectfully submitted,

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